FILED

98 909 DEC 2 1998

OFFICE OF THE CLERK

No. 98- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,
Petitioner,

v.

GARY A. BLOOM

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT D. METCALF
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1531

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a union security clause that tracks the language of National Labor Relations Act § 8(a)(3) is facially valid?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDIX A:	
Decision of the United States Court of Appeals for the Eighth Circuit, Dated August 7, 1998	1a
APPENDIX B:	
Order of the United States Court of Appeals for the Eighth Circuit, Dated October 15, 1998	17a
APPENDIX C:	
Supplemental Decision and Order of the National Labor Relations Board, Dated February 2, 1998	18a
APPENDIX D:	
Decision and Order of the National Labor Relations Board, Dated February 27, 1997	41a
APPENDIX E:	
Decision of the United States Court of Appeals for the Eighth Circuit, Dated July 27, 1994	56a
APPENDIX F:	
Order of the National Labor Relations Board Dated September 29, 1993	64a

TABLE OF AUTHORITIES

CASES — Page

Buzenius v. NLRB, 124 F.3d 788 (6th Cir., 1997), *vacated and remanded, sub nom. United Paperworkers Int'l Union v. Buzenius*, U.S. Sup. Ct. No. 97-945, 67 L.W. 3321 (Nov. 9, 1998) 7, 8

Communications Workers v. Beck, 487 U.S. 735 (1988) 9

Marquez v. Screen Actors Guild, 525 U.S. ——, 67 L.W. 4001 (Nov. 3, 1998) 6,7, 8, 9, 10, 11

NLRB v. General Motors Corp., 373 U.S. 734 (1963) 8

United Paperworkers Int'l Union v. Buzenius, U.S. Sup. Ct. No. 97-945, 67 L.W. 3321 (Nov. 9, 1998) 6

STATUTES

28 U.S.C. § 1254(1) 2

29 U.S.C. § 158(a)(3) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-——

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12,
Petitioner,

v.

GARY A. BLOOM

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Office and Professional Employees International Union, Local 12 petitions for a writ of *certiorari* to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit in *Bloom v. NLRB*, 8th Cir. No. 97-1582.

OPINIONS BELOW

The decision of the court of appeals as to which this Court's review is sought is reported at 153 F.3d 844 and is reprinted in the appendix to this petition ("Pet. App.") at pp. 1a-16a. The supplemental decision and order of the National Labor Relations Board at issue in the decision below is reported at 325 NLRB No. 49 and is re-

printed at Pet. App. 17a-40a. An earlier NLRB decision and order in this case is reported at 323 NLRB No. 31 and is reprinted at Pet. App. 41a-55a. The court of appeals' initial decision in this case is reported at 30 F.3d 1001 and is reprinted at Pet. App. 56a-63a. And, the NLRB's initial order in this case is unreported and is reprinted at Pet. App. 64a-65a.

JURISDICTION

The decision of the court of appeals was issued on August 7, 1998. The court of appeals denied timely motions for rehearing and suggestions for rehearing *en banc* of the National Labor Relations Board and of the Office and Professional Employees International Union, Local 12 on October 15, 1998. Pet. App. 17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), provides:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employee from making an agreement with a labor organization (not established, maintained, assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when

made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employees to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

STATEMENT

In 1991, Gary A. Bloom filed unfair labor practice charges with the National Labor Relations Board against his former employer Group Health, Inc., and his former collective bargaining representative Office and Professional Employees International Union, Local 12. Acting on these charges, the NLRB General Counsel then issued a complaint against Group Health and Local 12. In essence, the complaint: (i) challenged both the legal adequacy of the language of the union security clause of the parties' 1990-1993 collective bargaining agreement providing that covered employees were required as a condition of employment to "become and remain members in good standing in the Union," and the union's failure to advise the covered employees of the right to refrain from full union membership and be an agency fee payer instead, as well as the right of agency fee payers to object to paying, and by so doing to secure a reduction based on, the "nonrepresentational" portion of the agency fee; and (ii) alleged improper union threats to Mr. Bloom's employment if he refrained from full union membership and an

unauthorized deduction of dues from Mr. Bloom's wages. 8th Cir. Appendix 23-24.

Rather than contesting that complaint, Group Health and Local 12 thereafter entered into comprehensive settlement agreements with the NLRB General Counsel remedying each of the alleged unfair labor practices as follows: the parties agreed that they would not maintain a "members in good standing" union security clause without explaining in the clause that employees "need only pay the Union's periodic dues and initiation fees;" the union agreed to inform all Group Health employees of the percentage of its expenditures going for "non-representational activities" and of the agency fee payers' objection rights; the union agreed that it would not tell "employees that they are required to sign [a] membership application or checkoff authorization form[]" as a condition of employment; and the parties agreed that they would not deduct dues or fees from an employee's pay without prior written authorization. 8th Cir. App. 55, 57.[1]

Mr. Bloom, as the charging party, did not agree to the settlement agreements. That being so, the settlement agreements were submitted to the NLRB by the General Counsel for the Board's review of the settlements under the standards stated in *Independent Stave*, 287 NLRB 740, 743 (1987). On September 29, 1993, the Board entered an order approving the settlement agreements. Pet. App. 64a-65a.

Mr. Bloom petitioned the Eighth Circuit for review of the NLRB decision approving these settlement agreements. On July 27, 1994, the Eighth Circuit reversed the Board's decision on the ground that "an adequate remedy in this case requires expunction of the offending clause." Pet. App. 63a. The court of appeals "remand[ed] the

[1] The dues deducted from Mr. Bloom's pay had been returned to him prior to the settlement agreement, and the settlement provided that the union would notify the other employees of this action. 8th Cir. App. 57.

BEST AVAILAB

case to the Board for further proceedings consistent with th[at] court's opinion." *Id.*

On remand, the settlement agreements were revised to provide, *inter alia*, for both a substitute union security clause in the Group Health-Local 12 collective bargaining agreement and a union notice to all covered employees explaining that the employees who choose to be agency fee payers have the right to object to paying the "non-representational" portion of the fee and that the union will honor these objections by reducing the required agency fee and providing a detailed explanation of the basis for the reduction. Pet. App. 46a.

The substitute union security clause was negotiated by Group Health and Local 12 to include "additional explanatory language" intended to "settle this case without additional litigation . . . [by] meet[ing] the standard for union-security clauses set forth in the Sixth Circuit's *Buzenius* [124 F.3d 788] decision even on the most strict reading of that case." Pet. App. 21a. That clause now provides as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities. [Pet. App. 20a-21a]

Again, Mr. Bloom objected to the settlement agreements, and the Board, in a fully reasoned opinion, ap-

BLE COPY

proved the second revised settlement agreements on January 30, 1998. Pet. App. 26a-27a.

This case then returned to the Eighth Circuit on Mr. Bloom's continuing objection to the settlement agreements. In the decision as to which *certiorari* is sought, the court of appeals reversed the NLRB's decision approving the revised settlement agreements. Pet. App. 15a-16a.

In so doing, the Eighth Circuit ruled that the "membership" language of the new union security clause is "misleading and coercive" and that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed in the first sentence of the challenged provision." Pet. App. 11a, 12a. And, the court of appeals, in remanding this case, instructed the Board to order the inclusion of court-specified "language in the [Group Health] union security clause." Pet. App. 14a. The court below added that "we will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent." Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

On November 9, 1998, this Court issued a writ of *certiorari* in *United Paperworkers Int'l Union v. Buzenius*, No. 97-945, 67 L.W. 3321, and entered an order providing that "[t]he judgment [in that case] is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Marquez v. Screen Actors Guild*, 525 U.S. ——[, 67 L.W. 4001] (1998)."

The instant case, we submit, is on all fours with the *Buzenius* case. Here, as there, the Court should vacate the judgment of the court of appeals and remand for further consideration in light of *Marquez*.

1. The central question decided in *Marquez* was:

> whether a union breaches its duty of fair representation when it negotiates a union security clause that

> tracks the language of [NLRA] § 8(a)(3) without explaining, in the agreement, this Court's interpretation of that language. [67 L.W. at 4002.]

The *Marquez* opinion describes the Ninth Circuit decision that generated this question as follows:

> [T]he court [below] held that SAG had not breached the duty of fair representation merely by negotiating a union security clause that tracked the language of the NLRA. The court noted that the statutory language had been given a specialized meaning, but rejected petitioner's argument that the failure to fully explain this meaning in the collective bargaining agreement was an arbitrary or bad faith breach of the duty of fair representation. [*Id.* at 4003.]

In so ruling, the Ninth Circuit had "noted that two other Courts of Appeals had recently rejected similar claims." *Id.* And, this Court added that "[t]he Ninth Circuit's resolution of this issue is in tension with the decisions of two other Courts of Appeals. See, *e.g.*, *Buzenius v. NLRB*, 124 F.3d 788 (CA6 1997), cert. pending, No. 97-945; *Bloom v. NLRB*, 30 F.3d 1001 (CA8 1994)." 67 L.W. at 4004. Having noted this conflict in the circuits, the *Marquez* Court explained, "We granted certiorari to resolve the conflict over the facial validity of a union security clause that tracks the language of § 8(a)(3) . . ." *Id.*

2. Prior to the grant of *certiorari* in *Marquez*, the Paperworkers Union had filed a *certiorari* petition in *Buzenius* seeking review of the Sixth Circuit's decision and arguing that review was necessary to resolve precisely the circuit conflict identified in *Marquez*. The Court held the Paperworker's petition in *Buzenius* pending the disposition of *Marquez* on the merits. And, as noted, after deciding *Marquez*, the Court granted the Paperworkers' petition, vacated the Sixth Circuit's decision in *Buzenius* and remanded the case to that court for further consideration in light of *Marquez*.

3. The *Bloom* case has traveled a more circuitous route to this Court than the *Buzenius* case, but it has arrived in the same posture. The Eighth Circuit's *Bloom I* decision (30 F.3d 1001)—which this Court described as "in tension" with the Ninth Circuit decision affirmed in *Marquez*—generated two National Labor Relations Board decisions, the second of which supplants the first. The second NLRB decision then led to the Eighth Circuit's *Bloom II* decision (153 F.3d 844). And, it is *Bloom II* that has led to this *certiorari* petition.

4. The pivotal issue in *Bloom II*, as in *Marquez* and in *Buzenius*, is "the facial validity of a union security clause that tracks the language of § 8(a)(3)." 67 L.W. at 4004. And, on that issue, the Eighth Circuit's opinion in *Bloom II* expressly notes its agreement with the Sixth Circuit's decision in *Buzenius* and its disagreement with the Ninth decision in *Marquez*, in addition to noting that this Court had granted *certiorari* in *Marquez*. Pet. App. 12a n.3.[2]

Bloom II is in even greater tension with the Ninth Circuit's decision—and with this Court's decision—in *Marquez* than either *Buzenius* or *Bloom I*. Indeed, *Bloom II*'s analysis of, and ruling on, the facial validity of a standard-form union security clause is, on every analytical point, irreconcilable with this Court's analysis and ruling in *Marquez*.

Marquez begins from the proposition that "Section 8(a)(3) of the National Labor Relations Act . . . permits unions and employers to negotiate an agreement that requires union 'membership' as a condition of employment for all employees." 67 L.W. at 4002. And, after noting the limiting construction of the statutory term "membership" in cases such as *NLRB v. General Motors Corp.*,

---

[2] The parties in *Marquez* each filed supplemental briefs addressed to the Eighth Circuit's decision in *Bloom II*. *See* Petitioner's Supplemental Brief; Respondent's Reply to Petitioner's Supplemental Brief.

373 U.S. 734 (1963), and *Communications Workers v. Beck*, 487 U.S. 735 (1988), the *Marquez* Court recognizes that "a union security clause [drafted] with language derived from the NLRA section authorizing such a clause . . . *can* be enforced as written, because by tracking the statutory language, the clause incorporates all of the refinements that have become associated with that language." 67 L.W. at 4005 (emphasis in original).

As *Marquez* explains, "the relevant provisions of § 8(a)(3) have become terms of art[, so that] words and phrasing of the section now encompass the rights that we[re] announced in *General Motors* and *Beck*." 67 L.W. at 4005. Thus, the Court recognized that "[a] union might choose to use this shorthand precisely *because* it incorporates all of the refinements" entailed in the Court's interpretation of that statutory term. *Id.* (emphasis in original). For just this reason, the Court held that a union does *not* breach its duty "merely by negotiating a union security clause that uses the statutory language without explaining, in the agreement, the refinements introduced by our decisions in *General Motors* and *Beck*." *Id.* at 4004.

In upholding "the facial validity of a union security clause that tracks the language of § 8(a)(3)," 67 L.W. at 4004, the *Marquez* Court went on to note its agreement with the NLRB's ruling "that unions have an obligation to notify employees of their *Beck* rights" and that "[t]he Board is currently in the process of defining the content of the notification right to give guidance to unions about what they must do to notify employees about their rights under *Beck* and *General Motors*," *id.*

Bloom II is to the opposite effect of *Marquez* in every particular. *Bloom II* rests on the proposition that a union security clause that states that covered employees "shall become members of the Union" is "misleading and coercive," because, as the Eighth Circuit sees things, "[i]n

such a context, 'member' is not a term of 'art,' as has been suggested to us, but one of deception." Pet. App. 12a. *But see Marquez*, 67 L.W. at 4005 ("the relevant provisions of § 8(a)(3) have become terms of art; the words and phrasing of the section now encompass the rights that we announced in *General Motors* and *Beck*").

Indeed, the Eighth Circuit held that a standard-form union security clause tracking the language of NLRA § 8(a)(3) is so "misleading and coercive" that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed in the first sentence of the challenged provision." Pet. App. 12a. On this basis, the Eighth Circuit *reversed* the NLRB's approval of settlement agreements that provided *both* for the inclusion in the new union security clause itself of an explanation of the various ways employees can satisfy the requirement to become "members"—including by becoming an "objecting service fee payer" who pays "service fees . . . equal to . . . the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities," Pet. App. 20a—*and* for a separate union notice to all employees "of their *Beck* rights," Pet. App. 24a. *But see Marquez*, 67 L.W. at 4005 ("It is difficult to conclude that a union acts in bad faith by notifying workers of their rights through more effective means of communication and by using a term of art to describe those rights in a contract workers are unlikely to read.").

The Eighth Circuit, moreover, did not stop at overturning the particular settlement agreements at issue here. *Bloom II* bans the use of the word "member" as a term of art in *any and all* union security agreements and in *any and all* contexts and prescribes detailed contract language of the Eighth Circuit's own devising to replace the negotiated language in standard-form "membership" union security clauses. Pet. App. 12a-13a. To

enforce these prescriptions, *Bloom II* declares that the Eighth Circuit "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent." Pet. App. 13a. By so declaring, the Eighth Circuit effectively invalidated all the union security clauses in effect within the geographical jurisdiction of that court.

In *Marquez*, of course, this Court squarely rejected the contention that a union security clause that tracks the language of NLRA § 8(a)(3) is facially invalid.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the Eighth Circuit and remand this case for further consideration in light of *Marquez v. Screen Actors Guild*, 525 U.S. —— (Nov. 3, 1998).

Respectfully submitted,

ROBERT D. METCALF
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1531

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-1582

GARY A. BLOOM,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO LOCAL 12,
Intervenor on Appeal.

Petition for Review of an Order of the National Labor Relations Board

---

Submitted: March 11, 1998
Filed: August 7, 1998

Before WOLLMAN, BEAM, and HANSEN, Circuit Judges

WOLLMAN, Circuit Judge.

Gary A. Bloom, on behalf of himself and those similarly situated, petitions for review of a decision and order of the National Labor Relations Board issued pursuant to our remand in *Bloom v. N.L.R.B.*, 30 F.3d 1001, 1005 (8th Cir. 1994) (*Bloom I*). The Office and Professional

Employees International Union, Local 12, has intervened on behalf of the Board. We deny enforcement of the decision and order, and we remand with directions.

I.

During the summer of 1991, Bloom was hired as a clerical worker with Group Health, Inc. His position placed him within a bargaining unit represented by the union. The collective bargaining agreement between Group Health and the union contained the following union security clause:

ARTICLE 1

UNION RECOGNITION AND UNION SHOP

. . . .

> 1.03 All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

A few months after Bloom was hired, Group Health began to withhold union dues and initiation fees from his paycheck without his authorization and remit them to the union. In October, the union sent Bloom the following letter:

> Our office has been informed that you are now working for Group Health, Inc. We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union. We need these for our records and also to send to our International Office.

Bloom sent a reply to the union stating that he had received the application form but had not yet decided if

he wanted to join. He also stated that he had not authorized any deduction from his paycheck. He requested an itemization of how union dues were spent and reimbursement for the dues that had already been withheld. The union responded as follows:

> As stated in the New Member Packet, it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty-one days after you are hired. *If you choose not to be a member of Local 12, I shall have no aternative but to request GHI that your employment be terminated.* It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

(Emphasis supplied). In the meantime, Group Health continued to withhold union dues and fees from Bloom's paychecks and deposit them in union coffers.

In December of 1991, Bloom filed charges with the Board on behalf of himself and "similarly situated discriminatees" against Group Health and the union, alleging unfair labor practices under the National Labor Relations Act (Act), 29 U.S.C. § 158 (1973 & Supp. 1998). Bloom challenged the facial validity of the union security clause. He alleged that Group Health and the union had enforced the illegal membership obligations required by that clause upon himself and others by deducting union dues without authorization, refusing to inform employees of their right to decline union membership and pay only a reduced fee associated with representational costs, and threatening those who decline union membership with termination.

In January of 1993, the parties' stipulation of facts and motion to transfer the proceedings to the Board were approved. While the case was pending, Group Health and the union entered into a unilateral settlement agreement

with the Board's General Counsel. Over Bloom's objecjections, the Board approved the settlement by unpublished order on September 29, 1993. The agreement purported to remedy the unfair labor practices detailed by Bloom by requiring the union to post notices "in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting." The notice essentially stated that Group Health would no longer deduct and the union would no longer accept union dues without authorization. It further stated that neither party would interfere with Group Health employees' rights under the Act and that the provision of the collective bargaining agreement requiring union membership would no longer be enforced "unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees." The public notice also took care to single out Bloom as the employee who had filed charges with the Board. Bloom's complaint was then summarily dismissed.

Bloom petitioned for review pursuant to section 10(f) of the Act, 29 U.S.C. 160(f). We reversed the Board's approval of the settlement. *See Bloom I*, 30 F.3d at 1005. In particular, we concluded "that the settlement agreements are inadequate, for they do not delete the misleading union security clause that the charged parties unlawfully interpreted and applied." *Id.* at 1004. We also expressly rejected the idea that the presence of the unlawful clause in the bargaining agreement could be remedied by posting notice that the clause would not be enforced. *See id.* at 1005 ("posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect Group Health's employees' section 7 right to refrain from union activities"). Indeed, we concluded that the remedial notice itself was misleading, because it purported to enforce a provision requiring membership but providing "that employees need only pay the Union's periodic dues and initiation fees." *Id.* at 1004. Such language is itself con-

trary to law, we noted, because employees can never be required to become union members or "pay *all* union dues and initiation fees," but rather "need only pay that portion of union dues and fees attributable to the union's representational activities. *Id.* at 1004-05 (emphasis in original). Thus, "[b]ecause the overly broad union security clause was unlawfully interpreted and applied," we ordered that it be expunged from the collective bargaining agreement. *Id.* at 1005. We remanded the case to the Board for further proceedings.

On remand, Group Health and the union entered into a second settlement agreement with the General Counsel. The revised settlement provided that Group Health and the union would amend their contract to delete the provision requiring that employees become members in good standing and substitute a provision providing that union membership is required, but only to the extent that employes must pay the union's periodic dues and initiation fees. Bloom objected to the revised settlement, contending that it did not comport with our instructions in *Bloom I*. Nonetheless, the Board approved it and again dismissed Bloom's complaint. *See Group Health, Inc.*, 323 N.L.R.B. No. 31 (Feb. 27, 1997) (*Group Health II*). Bloom petitioned for review, seeking enforcement of our original mandate.

After the record and the parties' initial briefs were filed, the Board filed a motion requesting that we remand the matter so that the Board might reconsider its order in light of the Sixth Circuit's decision in *Buzenius v. N.L.R.B.*, 124 F.3d 788 (6th Cir. 1997). We granted the motion and remanded the case, expressly retaining jurisdiction over Bloom's petition. The Board then granted a motion by the union and Group Health to amend the settlement agreement a third time. The third settlement deleted the "in good standing" phrase from the collective bargaining agreement and substituted the following union security clause:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calender days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities.

Over Bloom's objections, the Board approved the settlement and issued its Supplemental Decision and Order on Remand. *See Group Health, Inc.*, 325 N.L.R.B. No. 49 (Feb. 2, 1998) (*Group Health III*).

II.

We deal first with jurisdictional matters. Pursuant to our grant of its motion to file supplemental briefs on the eve of oral argument, the Board has raised an eleventh-hour challenge to our authority over this case. It asserts that Bloom is not a "person aggrieved" under section 10(f) of the Act, 29 U.S.C. § 160(f), and thus does not have standing to petition for review of its order. We do not agree. Whenever the Board enters a final order against a charged party to its review proceeding, that party is a "person aggrieved" under the Act and is entitled to seek direct review in the appropriate court of appeals. *See International Union, United Auto., Aerospace & Agric. Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 210 (1965). Similarly, "if the Board determines that a complaint

should be dismissed, the charging party has a statutory right to review as a 'person aggrieved.'" *Id.*[1] Bloom is a charging party whose complaint was dismissed by the Board. As a result, he has express authorization from Congress to seek our review of the Board's order.

Although Bloom is clearly entitled to petition for review, he must also establish standing under Article III. *See Wilcox Elec., Inc. v. Federal Aviation Admin.*, 119 F.3d 724, 727-28 (8th Cir. 1997); *City of St. Louis v. Department of Transp.*, 936 F.2d 1528, 1532 (8th Cir. 1991). We conclude that he has done so. Bloom suffered the requisite "injury in fact" when union dues and fees were withheld from his paycheck without authorization. He has never entered into nor approved any settlement of his claims resulting from that incident. His injuries will not have been fully redressed until he has recovered not only the confiscated funds, but an appropriate award of interest to compensate for the period during which they were unlawfully utilized. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973) (approving of concept that "an identifiable trifle is enough for standing to fight out a question of principle").[2]

---

[1] *See also Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1294-95 (D.C. Cir. 1982); *N.L.R.B. v. Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO*, 476 F.2d 1031, 1036 (1st Cir. 1973); Annotation, *Who is a "Person Aggrieved," Entitled, Under Section 10(f) of the Amended National Labor Relations Act, To Review of Final Order of National Labor Relations Board in Appropriate Court of Appeals*, 1 A.L.R. Fed. 550 (1969 & 1997 Supp.).

[2] An injury sufficient to confer standing upon a party need not be monetary in nature. For instance, Bloom's constitutional rights to free speech and association may have been implicated, and he may have been constructively discharged as the result of his reluctance to join the union. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-19 (1991) (discussing First Amendment implications of compulsory union dues); *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 459 (8th Cir. 1985) (discussing possibility of standing

Nonetheless, the Board asserts that Bloom lacks standing because, seven years after his initial complaint, he is no longer employed by Group Health, an argument more closely related to the question of mootness. From the beginning, Bloom has consistently maintained this action on behalf of himself and those "similarly situated" who also have suffered as a result of the union's illegal practices against those who prefer not to join. This is, in other words, a representative petition. Although it is true that one generally may not support jurisdiction by seeking to vindicate the legal rights of others, that is a judicially self-imposed limitation upon federal jurisdiction which has no roots in Article III. *See United Food & Commercial Workers Int'l Union Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1429 n.3 (8th Cir. 1995) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)), *rev'd on other grounds*, 517 U.S. 544 (1996). Consequently, "[a] federal statute may give a putative plaintiff the right to bring suit, thus relieving him of the judicially-created, prudential standing requirements." *Brown Group*, 50 F.3d at 1429; *see also Akins*, 118 S. Ct. at 1783-84; *Family & Children's Ctr., Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1059-60 (7th Cir. 1994). As the Supreme Court has recently observed, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Akins*, 118 S. Ct. at 1783. We conclude that Congress intended to cast the standing net broadly here by authorizing "[a]ny person aggrieved" to seek review of an order by the Board under section 10(f) of the Act.

---

based upon "work environment" or "associational" injury). The necessary injury in fact might also be premised upon the union's violation of the Act itself. *See Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1785-86 (1998) (identifying injury sufficient to confer standing resulting from violation of "statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered").

Because Congress' express grant of standing to aggrieved persons such as Bloom extends to the limits of that which is permitted by Article III, the typical gauntlet of prudential limitations stands as no obstacle to our duty to promote the efficient interests of justice and, in particular, to enforce our previous mandate regarding the union security clause. *See Family & Children's Ctr.*, 13 F.3d at 1061; *Akins*, 118 S. Ct. at 1783-84; *Brown Group*, 50 F.3d at 1429. Thus, because Bloom seeks to vindicate the rights of all those currently affected by the facially invalid clause in the collective bargaining agreement, because he is the original charging party and a "person aggrieved" authorized by Congress to petition for review, and because he himself satisfies the minimum requirements for Article III standing, we conclude that his cause is not moot. "To hold otherwise would frustrate the remedial purposes of the Act." *N.L.R.B. v. Laborers Int'l Union of North America, AFL-CIO, Local 282*, 567 F.2d 833, 836 (8th Cir. 1977); *see also N.L.R.B. v. Modine Mfg. Co.*, 500 F.2d 914, 916 n.4 (8th Cir. 1974) (proceedings are not moot when settlement between employer and union contains cease and desist order and parties are "entitled to have the resumption of the unfair [labor] practice barred by an enforcement decree"); *N.L.R.B. v. Douglas & Lomason Co.*, 443 F.2d 291, 294 (8th Cir. 1971).

III.

In *Bloom I*, we made clear that, although "[t]he Board has a longstanding policy of encouraging the settlement of labor disputes," it must "not approve a settlement that does not effectuate the purposes and policies of the Act." 30 F.3d at 1003. One of the Act's primary policies, and a fundamental tenet underlying all of labor relations jurisprudence, is voluntary unionism, the notion that a person's job, or the terms of his employment, may never be conditioned upon membership in a labor union. *See id.* Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or

freely rejected. Thus, section 7 of the Act guarantees employees the right to engage, or refrain from engaging, in activities in support of collective bargaining. 29 U.S.C. § 157. Section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labor union. 29 U.S.C. § 158(a)(3). Likewise, the Act imposes a duty of fair representation upon labor organizations, prohibiting them and their agents from restraining or coercing employees in the exercise of guaranteed rights. 29 U.S.C. § 158(b); *see also Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (stating that union's status as exclusive bargaining representative gives rise to statutory obligation to serve interests of all employees "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct").

Section 8(a)(3) of the Act provides:

> *Provided*, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

29 U.S.C. § 158(a)(3). Read literally, this language would permit unions and employers to include within a collective bargaining agreement a provision that would require union membership as a condition of employment. As we pointed out in *Bloom I*, however, the Supreme Court has not given section 8(a)(3) a literal reading. 30 F.3d at 1003-04.

In *Pattern Makers' League of North America, AFL-CIO v. N.L.R.B.*, 473 U.S. 95, 107 n.16 (1985), the Court noted that the payment of dues is the only aspect

of union membership that can be required under section 8(a)(3); *see also N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742 (1963). In *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63 (1988), the Court held that nonunion employees can be required to pay only those dues and fees associated with costs incurred by the union in association with its core representational activities. *See also International Ass'n of Machinists & Aerospace Workers v. N.L.R.B.*, 133 F.3d 1012, 1015 (7th Cir. 1998); *Vic Koenig Chevrolet, Inc. v. N.L.R.B.*, 126 F.3d 947, 951 (7th Cir. 1997). A union may insist upon nothing more from an employee and may not require membership in any sense. "This has been settled law for some time, and the only realistic explanation for the retention of the statutory language in collective bargaining agreements, as the courts have observed, is to mislead employees about their right not to join the union." *Wegscheid v. Local Union 2911*, 117 F.3d 986, 990 (7th Cir. 1997).

As set forth above, the clause under challenge here begins with the following statement:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calender days, within the requirements of the National Labor Relations Act.

This language is not simply misleading and coercive, it is repugnant to the Supreme Court's pronouncements in *Beck* and *Pattern Makers* and is in direct conflict with our mandate in *Bloom I*. Although *no* employee can be required to join the union, this provision turns truth upon its head and informs those it governs that *all* employees are required to become and remain union members. The confusing caveat that follows the offending clause contains nothing from which an employee might possibly

glean the knowledge that he may decline to join the union. In any event, no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the *unqualified command* expressed in the first sentence of the challenged provision.[3] As Bloom can well attest, when an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement in an attempt to pressure him into signing up. The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them. In such a context, "member" is not a term of "art," as has been suggested to us, but one of deception. In his concurrence to the Board's opinion, Chairman Gould conceded as much. *See Group Health III*, 325 N.L.R.B. No. 49 at 5 (Gould, concurring).

The settlement agreement approved by the Board on remand seems to have been calculated to evade both the letter and spirit of *Bloom I*. The Board's supplemental decision reflects a disregard of our directives. Accordingly, rather then simply remanding this case to the Board for further proceedings consistent with our opinion, we remand with specific instructions. *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 135 F.3d 535, 541 (8th Cir. 1998) ("We have not only the power, but also a duty to enforce our prior mandate to present evasion").

---

[3] *See Buzenius*, 124 F.3d at 792 ("To permit the [collective bargaining agreement] to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation"); *Wegscheid*, 117 F.3d at 990-91; *Bloom I*, 30 F.3d at 1004-05; *but see Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1034, 1037-39 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 1298 (March 23, 1998); *International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers, AFL-CIO v. N.L.R.B.*, 41 F.3d 1532, 1537-38 (D.C. Cir. 1994).

INSTRUCTIONS AND ORDER

The offending union security clause contained within the third settlement agreement shall be deleted in its entirety. In its stead, the following provision shall be inserted:

> No employee shall be required to become or remain a member of the union as a condition of employment.
>
> Each employee shall have the right to freely join or decline to join the union.
>
> Each union member shall have the right to freely retain or discontinue his or her membership.
>
> Employees who decline to join the union may be required, at a minimum, to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues.
>
> No employee shall be discriminated against on account of his or her membership or non-membership in the union.

Moreover, we hereby serve notice that we will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent.

The union and Group Health may agree to include, in a section that follows the foregoing language, a clause that further explains the various levels of membership and non-membership from which an employee is free to select. However, the agreement may contain no language that states or implies that an employee must join or become a member of the union (or remain a union member) in any sense or context. Before approving the agreement as so revised, the Board shall ensure that Bloom has been fully redressed for any fees or dues unlawfully withheld from his paycheck, including an appropriate award of interest thereon.

We deny enforcement of the Board's decision and order, and we remand the case to the Board for the inclusion of the above set forth language in the union security clause and for the entry of appropriate relief to Bloom.

A true copy.

Attest:

Clerk
U.S. Court of Appeals
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1582

GARY A. BLOOM,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO LOCAL 12,
Intervenor on Appeal.

Petition for Review of an Order of the
National Labor Relations Board

JUDGMENT

This cause was submitted on the petition for review of an order from the National Labor Relations Board, on the original record, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the National Labor Relations Board's decision and order shall not be enforced. The cause is remanded to the National Labor Relations Board with instructions to include certain specific language in the parties' settlement agreement and for the entry of appropriate relief to peti-

tioner Bloom in accordance with the opinion of this Court.

August 7, 1998

A true copy.

Attest: /s/ Michael E. Gens
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-1582

GARY A. BLOOM,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ORDER DENYING PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

The suggestions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

October 15, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 18-CA-12025 and 18-CB-3144

GROUP HEALTH, INC. *and* GARY BLOOM

OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12 *and* GARY BLOOM

February 2, 1998

SUPPLEMENTAL DECISION AND ORDER ON REMAND

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

This case is before the National Labor Relations Board pursuant to the Board's request for a remand from the Eighth Circuit, which was granted on November 4, 1997. On January 8, 1998, the Respondent Employer and the Respondent Union filed a motion to amend the settlement agreements. We accept the Eighth Circuit's decision in *Bloom v. NLRB*, 30 F.3d 1001 (1994), as the law of the case, grant the motion to amend the settlement agreements and approve the second revised settlement agreements as consistent with the court's decision in *Bloom* and as comporting with the Board's *Independent Stave* analysis for approving settlement agreements.

Procedural History

On January 26, 1993, the Board approved the stipulation of facts in this case and transferred the proceeding to the Board. The stipulation indicated that the Respondent Employer and the Respondent Union were parties to a collective-bargaining agreement containing the following union-security clause:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days. . . .

The stipulation also indicated that union dues and initiation fees were withheld from the pay of Charging Party Gary A. Bloom without his authorization, and that he was advised by the Union that he must join the Union or it would seek his discharge.

On May 10, 1993, the General Counsel filed with the Board a motion for approval of settlement agreements.[1] The Board granted this motion by unpublished Order dated September 29, 1993. Thereafter, the Charging party filed a petition for review with the Eighth Circuit.

On July 27, 1994, the Eighth Circuit Court of Appeals issued a decision granting the Charging Party's petition

---

[1] The settlements (one between the General Counsel and the Respondent Union and one between the General Counsel and the Respondent Employer) provided that the Respondents would not give effect to the above-cited union-security clause unless the clause also provided that the employees only need pay the Union's periodic dues and initiation fees. The settlements also indicated that the Charging Party had been reimbursed for any moneys wrongfully withheld from him. Further, the settlements provided that all employees would be given notice of their *Beck* rights to object to paying dues for nonrepresentational union expenditures, and that all employees who objected to paying full union dues would be reimbursed.

for review and remanding the case to the Board, finding that because the union-security clause was unlawfully applied, it must be expunged from the parties' collective-bargaining agreement.[2] On June 2, 1995, the General Counsel filed a second motion for approval of settlement agreements. These revised settlement agreements provided that the above union-security clause would be expunged and a new union-security clause substituted. On February 27, 1997, the Board issued a Decision and Order approving the revised settlement agreements (*Group Health II*).[3] The Charging Party again petitioned for review of the Board's decision.

While this case was pending before the Eighth Circuit, the Sixth Circuit, on September 8, 1997, issued its decision in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997).[4] Thereafter, the Board, as then-constituted requested that the Eighth Circuit remand the instant case to the Board for consideration in light of *Buzenius*. This request was granted by order of November 4, 1997. All of the parties filed statements of position with respect to the Board's request for remand from the Eighth Circuit.

On January 8, 1998, in response to the Board's request for remand from the Eighth Circuit, the Union and the Employer filed with the Board a motion to amend the previously revised settlement agreements which the Board has granted. As amended, the revised agreements (hereinafter referred to as the "second revised settlement agreements") provide for the expunction of the "members in good standing" union-security clause that the Eighth Circuit found in *Bloom* had been unlawfully interpreted and applied, and for substitution of a new union security clause as follows:

---

2 *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994).

3 323 NLRB No. 31 (Feb. 27, 1997).

4 Revg. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995).

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities.

In all other respects, the second revised settlement agreements are the same as the revised settlement agreements previously approved by the Board in *Group Health II*.[5]

The Employer and the Union assert that they have negotiated the new union-security language for inclusion in their collective-bargaining agreement in order to settle this case without additional litigation. They maintain that the additional explanatory language meets the standard for union-security clauses set forth in the Sixth Circuit's *Buzenius* decision even on the most strict reading of the that case. They assert that approval of the second revised settlement agreements will further all the interests protected by the NLRA, most particularly, the interest in the prompt settlement of disputes arising under the Act on just and reasonable terms.

The General Counsel has also urged the Board to approve the agreements, on the grounds that they completely remedy all the complaint allegations under extant

[5] Thus, the agreements include provisions for notice to each employee in the bargaining unit of changes to the union-security clause and of employees' rights and obligations under that clause.

Board law.[6] The Charging Party urges rejection of the agreements, arguing that the first sentence of the amended union-security clause is illegal, overbroad, and unenforceable under *Communication Workers v. Beck* [7] and *Pattern Makers v. NLRB*,[8] and complies with neither the letter nor the spirit of *Buzenius*.

Approval of the Second Revised Settlement Agreements

Given the age of this case and its procedural posture,[9] we have now determined that this case is not the appropriate vehicle in which to address the issue raised by the Sixth Circuit's *Buzenius* decision.[10] Rather, after careful consideration, the Board has decided to grant the motion to amend the settlement agreements and to approve the second revised settlement agreements. We find that they are reasonable and appropriate under *Independent Stave*,

---

[6] Noting that the Board traditionally does not reconsider precedent when it is reviewing a settlement agreement, the General Counsel has urged the Board not to do so here.

[7] 487 U.S. 735 (1988).

[8] 473 U.S. 95 (1985).

[9] On January 26, 1993, the Board approved the stipulation of facts in this case and the proceeding was transferred to the Board. Thereafter, the General Counsel filed, and the Board approved, two different settlement agreements. Because of this, briefs on the merits of the stipulation have never been filed. Moreover, since the date of the Board's request to the Eighth Circuit for remand, one Board member has departed, and three new members have joined the Board.

[10] Member Hurtgen wishes to emphasize his view that he is not necessarily endorsing the clause involved herein. He agrees only that it is not inconsistent with the Eighth Circuit law of the case and is a satisfactory settlement under that law. In another context, he might well hold that the Board as a matter of policy, should require a different clause or, at least, should have a different clause as a model.

287 NLRB 740 (1987), and they conform to the intent of the Eighth Circuit's decision in *Bloom*.

In *Independent Stave* the Board set forth the factors it would examine in determining whether to approve a settlement agreement:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

287 NLRB at 743. Applying these factors and considering all the circumstances, we have determined that the second revised settlement agreements effectuate the purposes and policies of the Act.

The Respondents have agreed to be bound by the second revised settlement agreements, and the General Counsel urges their approval. As we noted in our earlier decision, although the Charging Party opposes the revised settlements, where the other factors in *Independent Stave* are met and where the other parties in the case agree to be bound to the settlements, the Board is not precluded from approving a settlement agreement over the objections of a charging party. See, e.g., *Shine Building Maintenance*, 305 NLRB 478 (1991).

We find that the other factors in *Independent Stave* are met. The revised settlements are reasonable in light of the nature of the violations alleged, the risks inherent

in litigation, and the stage of the litigation. In addition, there is no allegation by any party that the second revised settlement agreements are a product of fraud, coercion, or duress, nor is there any evidence that the Respondents have engaged in a history of violations of the Act or have breached previous agreements resolving unfair labor practice disputes.

The Union-Security Clause Language

In addition, as was the case with the first revised settlement agreements, we find that the concerns about the original settlement expressed by the Eighth Circuit in *Bloom* have been rectified. First, we note that the language objected to by the court has been deleted and different language substituted. The Charging Party argues that the substitute language is as unacceptable under *Bloom* as the "members in good standing" language in the original settlements because the statement that "[a]ll Employees . . . shall, as a condition of continued employment, become and remain members of the Union" continues to mislead employees as to their right to refrain from joining the union.

We disagree. The reason given by the Eighth Circuit for requiring expunction of the "members in good standing" language is that this language in the union-security clause was unlawfully interpreted and applied. The amended union-security clause now present in the collective-bargaining agreement has not been unlawfully interpreted or applied, and gives an additional explanation of what the limits of an employee's financial obligations to the Union are. Further, this additional explanatory language meets the court's concern that "employees subject to a union-security clause cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees . . . ."[11] The amended union-security

[11] *Bloom*, 30 F.3d at 1004-1005 (citations omitted; emphasis in the original).

clause provides notice to the employees in their collective-bargaining agreement that they need not pay full union dues and fees.

Contrary to our dissenting colleague, we do not view approval of the second amended settlement agreements as inconsistent with the law of the case established by the Eighth Circuit on the theory that the clause is "misleading." We do not understand the court to have insisted that the only possible lawful clause would be one that eschews the literal language of the statute. Rather, as we understand it, the court was concerned that the temporary posting of an explanatory notice would not suffice to make employees aware of the "lawful extent of their union obligation" after the posting period had ended. The second amended settlement agreements incorporate a clause with an explanation of "the lawful extent of [the employees'] union obligation" and that explanation will remain in the clause so long as it is in effect.

In addition, current Board law requires that newly hired employees be given notice of their *Beck* rights before or at the time the union seeks to obligate them under a union-security provision.[12] Accordingly, as we noted in our earlier decision, "as new employees enter the unit, they will introduce into the unit a continuing awareness of *Beck* rights." With the removal from the collective-bargaining agreement of the language that the court held had been unlawfully interpreted and applied, the presence in the collective-bargaining agreement of language describing the limits of employees' financial obligations to the Union, the written notice sent out to each unit member that the language has been expunged and new language substituted, and the requirement under *Weyerhaeuser* that all unit employees be notified of their *Beck*

---

[12] *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. —— F.3d ——, Docket Nos. 96-1246, et al. (Jan. 14, 1998).

rights, we believe that the court's concerns about the adequacy of a temporary notice posting have been met.

Scope of the Remedy

We adhere to our earlier decision in 323 NLRB No. 31 regarding the scope of the remedy. As we found there, although the Charging Party argues that all unit employees should be reimbursed for all dues and initiation fees paid to the Union since June 23, 1991,[13] there is no evidence that any employee, other than the Charging Party, suffered any economic loss because of reliance on the provisions of the union-security clause. The second revised settlement agreements indicate that the Charging Party has been reimbursed all dues and fees that were unlawfully withheld from his wages. Further, the second revised settlements do provide that all employees who became members of the Union during the statutory limitation period may become nonmembers, and such nonmembers may register an objection to full dues and fees and if they do so, will be reimbursed for that portion of the dues and fees they have paid that are not attributable to the Union's representational activities.

In *Weyerhaeuser,* the respondents excepted to the judge's recommended remedial requirement that the union reimburse the charging party for all dues collected since his resignation from membership and filing of a *Beck* objection. The Board held that the union was required to reimburse only those dues determined to be in excess of the amount that the union could lawfully collect under *Beck.* 320 NLRB at 349 fn. 4.[14] Accordingly, in light of all these

---

[13] The Eighth Circuit, in fn. 2 of its decision, indicated that "having concluded that the Board should not have approved the settlement agrements because they do not expunge the union security clause, we need not consider the other grounds upon which *Bloom* challenges the agreements." 30 F.3d at 1005 fn. 2.

[14] See *Gilpin v. American Federation of State, County, & Municipal Employees, AFL-CIO,* 875 F.2d 1310, 1314-1316 (7th Cir. 1989).

factors, we find that the scope of the remedy set forth in the second revised settlement agreements is adequate and that it will effectuate the purposes and policies of the Act to approve the second revised settlement agreements.[15]

ORDER

The Board, having duly considered the matter, orders that the General Counsel's motion is granted and the complaint is dismissed in its entirety, and the case is remanded to the Regional Director for Region 18 for further appropriate action.

Dated, Washington, D.C. February 2, 1998

Sarah M. Fox Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[15] Our concurring colleague has set forth his broad views concerning the language that can lawfully be used in a union-security clause. We agree that the Board should address that issue. We do not agree that this is an appropriate case in which to do so.

As our colleague knows, the Board now has before it cases in which the issue can be addressed and resolved. Further, in those cases, the Board can, and will, receive the views of all parties and interested amici. We believe that this open and deliberative process will help us to formulate intelligent and practical guidance for unions, employers and employees who are covered by the Act.

By contrast, the instant case is not an appropriate vehicle for resolving this issue. As discussed supra, the narrow question in this case is whether the settlement agreements are acceptable within the parameters of *Independent Stave* and the circuit court law of this case. Our colleague agrees that the settlements are acceptable, the difference between us is that he would go further than is necessary for the disposition of this case, while we would await full briefing by all interested parties and amici in an appropriate case.

CHAIRMAN GOULD, concurring.

I agree with the majority's decision to grant the motion to amend the settlement agreements and to approve the agreements and dismiss the complaint. Contrary to my colleagues' assertion, however, this *is* an appropriate forum in which to address my partial adoption of the *Buzenius* rationale in my concurring opinion in *Monson Trucking*.[1] I am of the view that the Board should adopt my concurring opinion in *Monson Trucking*, that union-security clauses requiring unit employees to become "members" or "members in good standing," without concurrent definition, are facially invalid under the National Labor Relations Act.[2]

The present controversy over the permissible language of union-security clauses comes as no surprise to anyone who has been involved in labor law for any length of time. As a practitioner and an academic in the field since 1961, it has long been apparent to me that the area of union-security clauses is fraught with obfuscation and ambiguity. The Board is responsible for a good deal of the problem as a result of its 1958 decision in *Keystone Coat, Apron & Towel*, 121 NLRB 880. That case set forth a "model" union-security clause which stated in part that "[i]t shall be a condition of employment that all employees of the Employer covered by this agreement . . . shall . . . become and remain members in good standing in the

---

[1] 324 NLRB No. 149, slip op. at 6-8 (Oct. 31, 1997). I set forth this view initially in *Teamsters Local 443 (Connecticut Limousine Services)*, 324 NLRB No. 105, slip op. at 6-7 (Oct. 2, 1997) (Chairman Gould, dissenting).

[2] As set forth more fully in my concurrence in *Monson Trucking*, however, I disagree with the Sixth Circuit's reliance in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), revg. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), on *Pattern Makers*, 473 U.S. 95, 104-106 (1985), and I would, for the reasons stated in *Monson*, supra, slip. op. at 6-7, reverse the Board's holding in *Machinists Local 1414 (Neufeld Porsche-Audi)*, 270 NLRB 1330 (1984), to which the Court deferred.

Union." The Board deemed this language to be the maximum permissible in conformity with the requirements of the Act. Id. at 885.

The use of the term "members in good standing" implies that actual "full" membership in the union is required in order to retain one's employment, something that has long been recognized as contrary to what the Act permits. Indeed, insofar as some unions require their members to be "members in good standing" for reasons unrelated to the periodic payment of dues and initiation fees (for instance, as it relates to attending meetings and payment of assessments and fines).[3] *Keystone* is inconsistent with an interpretation of our statute which prohibits the conditioning of employment upon considerations other than the payment of periodic dues and initiation fees, let alone the present interpretation discussed, infra, under which unions and employers are precluded from requiring full membership.

---

[3] See, e.g., *DOL v. Aluminum & Glass Workers Local 20*, 941 F.2d 1172, 1174, (11th Cir. 1991), where a local union constitution defines "members in good standing" as "[a]ll dues (except current month's dues), fines, reinstatement fees, and assessments, must be paid in full not later than the adjournment of the nomination meeting." See also *Graphic Arts International Union Local 32B*, 250 NLRB 850, 854-855 (1980); *Bay Area Typographical Union Local No. 21 (Northwest Publications)*, 218 NLRB 812, 814 (1975); and *Union Starch & Refining Co.*, 87 NLRB 779, 780 (1949), enfd. 186 F.2d 1008 (7th Cir. 1951). Cf. Macaluso, *The NLRB "Opens the Union," Taft-Hartley Style*, 36 Cornell L. Q. 443 (1951). Such definitions of "good standing" are likely to lead employees to believe that this language in a union-security clause requires much more than the payment of periodic dues and initiation fees. As the Board itself has noted, "it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretive decisions will literally interpret the clause as requiring full membershp and all attendant financial obligations, e.g., assessments. At a minimum, they will be confused about their obligations." *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1991), enf. denied sub nom *Electronic Workers IUE v. NLRB*, 41 F.3d 1552 (D.C. Cir. 1994).

As early as 1954, however, even prior to *Keystone*, the Supreme Court stated in dicta that the "legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954). In 1963, the Supreme Court in *NLRB v. General Motors*,[4] held that membership within the meaning of Section 8(a)(3) does not consist of full membership but consists exclusively of the obligation to pay periodic dues and initiation fees as a condition of employment under a valid union-security clause. The Court stated that: " 'Membership' as a condition of employment is whittled down to its financial core."- Id. at 742. The view that full membership is not required was reiterated by the Court only 4 years later in *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967). Indeed, it formed the basis for the Court's findings that it was lawful to impose union discipline on full members. The Court recognized that the lawfulness of a union's ability to assess penalties against employees it represents is wholly dependent on whether the employee has voluntarily chosen to accept the obligations of membership.[5]

Despite this clear statement by the Court that full membership cannot be compelled as a condition of employment, neither unions, employers, nor the Board have undertaken to change or refine the standard language of

---

[4] 373 U.S. 734 (1963).

[5] See Atleson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 U.C.L.A. L.Rev. 681 (1970); Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L.Rev. 227 (1968); Gould, *Some Limitations Upon Discipline Under the National Labor Relations Act: The Radiations of Allis Chalmers*, 1970 Duke L.J. 1067; Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers, and Scofield*, 38 Geo. Wash. L.Rev. 187 (1969); and Wellington, *Union Fines and Workers' Rights*, 84 Yale L.J. 1022 (1976).

most union-security clauses, as set forth in *Keystone*: that employees must become and remain "members" or "members in good standing."

In *Beck v. Communication Workers of America*, 487 U.S. 735 (1988), the Court upheld the right of nonmember unit employees to object to paying through union dues and initiation fees for expenditures that are not germane to collective bargaining and contract administration. The Court revisited the meaning of "membership" under Section 8(a)(3), and held that the most that may be required under Section 8(a)(3) is the payment of "those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" [6]

In the wake of *Beck*, the Board addressed the "member in good standing" language, and found that it was ambiguous. In *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1991), enf. denied sub nom. *Electronic Workers IUE v. NLRB*, 41 F.3d 1552 (D.C. Cir. 1994), the Board found that the union had violated its duty of fair representation by maintaining a union-security clause requiring that employees become and remain "members of the Union in good standing" as a condition of employment, without apprising them of their *General Motors* rights. The Board also specifically rejected the model clause in *Keystone*, because of its finding that the phrase "membership in good standing" is ambiguous. Id. at 1041. The Board indicated that, in view of that ambiguity, a union was required to give employees notice as to what their obligations were, but did not find the clause to be facially unlawful or offer a new model for an appropriate union-security clause.[7] Thus, the clause has continued to be used.

---

[6] 487 U.S. at 762-763 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

[7] In *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), the Board held that, without regard to the pre-

As I have noted before, even today, many workers and employers do not understand that "membership" is what the Supreme Court has defined it to be in its 1963 *General Motors* holding.[8] Indeed, the Board's failure to do more to correct the misimpression of this term has allowed unions and employers to perpetuate it, and thus reap the benefits of the confusion over the use of the word "membership" in union-security clauses. By failing to require the parties to accurately define this word, the Board has permitted unions and employers to mislead the employees it represents into believing that they must join the union or lose their jobs. Any such scheme to keep employees uninformed about their rights is at odds with traditional concepts of trade unionism, that is, the protection and defense of the worker from exploitation and unfair or arbitrary treatment. In this regard, unions and employers have been permitted to sow confusion to the disadvantage of those which unions have a duty to represent fairly, and the Board, by failing to adopt my views in *Monson* today, continues to be their accomplice.

As Judge Posner noted in *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 991 (7th Cir. 1997):

> [N]othing we have said has been intended to suggest that unions and employers have the privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads

---

cise language of a union-security clause, union members, as well as nonmembers, must receive notice of their *Beck* and *General Motors* rights in order to assure that they had not been misled to believe that payment of full dues and assumption of full membership is required under a union-security clause. Id. at 350.

[8] See my speech "Campaign Finance Reform and the Union Dues Dispute Under Beck," given October 8, 1997, to the Iowa Chapter of the Industrial Relations Research Association. 195 DLR E-1 (Oct. 9, 1997).

employees, either by itself or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

The point is that "membership" must be defined. Member Brame, in dissent, relies upon Judge Posner's opinion to state that the settlement agreements are deficient because they speak in terms of "membership." But this is what the Act itself states and what all Supreme Court authorities alluded to above have done. Thus, the dissent contradicts the statutory language as *used* and *defined* by the Court for four and one-half decades. The fact that the second revised settlement agreements' language mirrors the statute and reflects the judicially approved definition of the statutory term "membership," is why the settlements are compatible with the Act.

To reason, as does the dissent, Congress would have to remove the word "membership" from Section 8(a)(3). This Board must interpret the Act as written.

As stated above, there are those—both employers and employees—who may not fully understand the legal nuances concerning the term "membership." For some who are engaged in the field of labor law, there is no mystery to the term. But, for the Board to allow the term "membership" to go undefined merely perpetuates the illusion that full union membership is a requirement of employment, a requirement completely inconsistent with the Act's standards, as fashioned by the Supreme Court in numerous interpretations. It is time for the Board to put an end to this confusion and frankly state that membership undefined is inherently ambiguous at best and misleading at worst. To state this obvious, yet still unaccepted, point (unaccepted by the Board, that is) is to dramatize anew the fact that the Emperor, who tolerates contract clauses in which "membership" is left undefined, has no clothes!

The present case provides the Board with the opportunity to correct the mistake it made forty years ago in

Keystone Coat, and to clarify for unions, employers and employees alike what the permissible requirements are under a union-security clause in terms of employees' obligations to a union. It is the Board's duty to give guidance to the public as to what is acceptable under the Act, and in so doing, diminish the potential for wasteful litigation that is now present in this area.[9]

In my view, the Board should do so today, both by adopting the views set forth in my concurring opinion in *Monson*, and by setting forth a new model union-security clause as a "safe harbor" for unions and employers who wish to comply with the requirements of the Act. In this regard, I propose the following as a model union-security clause in collective-bargaining agreements:

> On or after the thirtieth day (or eighth day if an 8(f) prehire agreement) following the beginning of employment, the effective date of this agreement, or the execution date of this agreement, whichever is later, every employee covered by this agreement shall, as a condition of employment, become and remain a member of the Union. Membership as used herein shall mean only the obligation to pay periodic

---

[9] See my dissent in *Flint Iceland Arena*, 325 NLRB No. 43 (Jan. 23, 1998), where I also urge the diminishment of potentially wasteful litigation within the context of non-Board settlements. Illustrative of a decision which substantially diminished litigation through its broad and clear mechanical rule relating to jurisdiction was *Management Training*, 317 NLRB 1355 (1995). The doctrine in *Management Training* has been approved in *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997), and in *Pikeville United Methodist Hospital v. NLRB*, 109 F.3d 1146 (6th Cir. 1997), where we asserted jurisdiction over private employers. Consistent with this view, I have also advocated the promotion of voluntary recognition agreements in order to avoid unnecessary litigation. See *Smith's Food & Drug Centers*, 320 NLRB 844, 847-848 (1996) (Gould, W., concurring). The Board has concurred with this approach in its promotion of settlement agreements negotiated where a decertification petition has been filed and an incumbent union has an established relationship with the employer. *Douglas-Randall, Inc.*, 320 NLRB 431 (1995).

> dues and initiation fees uniformly required, or, in the event that the employee objects to the payment of full dues and initiation fees, only the obligation to pay periodic dues and initiation fees related to representational costs.

A clause such as this clearly informs the reader—lay people, lawyers, and labor relations experts alike—that "member" as used therein is a term of art that requires only a financial commitment from the employee. This information is essential to enable employees to make an informed choice about their financial commitment to the union. I believe that adoption of such a model clause would be helpful to and necessary for practitioners, employees, and employers, and would begin to rectify the problems created by *Keystone*. I deeply regret my colleagues' reluctance to adopt my concurring opinion in *Monson Trucking*, and to join me in adopting a model clause to guide the public in this area.

My colleagues in the majority state that by urging the acceptance of my position in *Monson Trucking* and by setting forth a new model union-security clause, I am going beyond what is necessary for the disposition of this case. However, the Supreme Court spoke unequivocally on these issues 35 years ago,[10] and made it clear for all to see how lawful membership requirements must be defined. Therefore, I see no reason to wait for another case in order to address them. In addition, I see no reason to delay a decision so that the Board can receive further briefs on the issue in order to "formulate intelligent and practical guidelines for unions, employers and employees."

Moreover, this is not a case of first impression for the Board, which as Jusice Frankfurter aptly stated, is "equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades v. Garmon*, 359 U.S. 237, 242 (1959). The Board's expertise has been chronicled by the Court on countless occasions. See, e.g.,

---

[10] *NLRB v. General Motors*, supra.

NLRB v. Erie Resistor, 373 U.S. 221, 236 (1963); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. Town & Country Electric*, 516 U.S. 85, 116 S.Ct. 450, 453 (1995); *Auciello Iron Works v. NLRB*, 517 U.S. 781, 116 S.Ct. 1754, 1760 (1996); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 116 S.Ct. 1396, 1406 (1996); and *Allentown Mack Sales v. NLRB*, Docket No. 96-795, slip op. at p. 4 (Jan. 26, 1998).

Additionally, this issue has been with the Board since *Keystone*, and the public has been without guidance as to lawful union-security clause language since *Paramax* issued. Further, the issues here have also been thoroughly and thoughtfully addressed by various courts of appeals. The Board in fact requested that this case be remanded by the Eighth Circuit in order to do exactly what I have done in my concurrence—address the impact of *Buzenius* on Board law. It is the Board's responsibility to act quickly and definitively in order to effectuate the purposes of the Act. And, as the expert agency, it is the Board's obligation so to do.

Accordingly, although I joint my colleagues in granting the motion to amend the settlements and approving the settlement agreements. I do so because I believe that the union-security clause presented by the amended settlements is in accord with my views as set forth in *Monson Trucking*, as well as with the holdings of *Buzenius* and *Bloom*, and because the clause is in accord with the standard the Board should adopt as its own, i.e., that union-security clauses requiring that an employee be a "member" or "member in good standing," without concurrent definition of those terms, are facially invalid.

Dated, Washington, D.C. February 2, 1998

William B. Gould IV, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER BRAME, dissenting.

I would not approve the settlement agreements in this case, both because they fail to remedy defects explicitly identified by the court of appeals, and because they would put the Board in the business of issuing advisory opinions in unfair labor practice proceedings without litigation of the issues.

The controversy here originally stemmed from the following union-security clause in the Respondents' collective-bargaining agreement.

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

The Eighth Circuit, in reversing the Board's approval of settlement agreements that did not alter this contract language,[1] concluded that the language was "misleading" [2] and "overly broad," [3] conveying to employees that, in order to keep their jobs, they must acquiesce to the clause's literal requirement, i.e., become union members. Further, the court found that the clause had been "unlawfully interpreted and applied." [4] Therefore, the court held, inter alia, that "an adequate remedy [of the alleged violation of Section 8(b)(1)(A)] . . . requires expunction of the offending clause." [5]

Now the parties, other than the Charging Party, seek Board sanction for revised settlement agreements expressly

---

1 *Bloom v. NLRB*, 30 F.3d 1001 (1994).

2 Id. at 1004.

3 Id. at 1005.

4 Id.

5 Id.

incorporating a newly negotiated contractual union-security clause:

> All employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities.

This new contract provision suffers from the same infirmities condemned by the court in *Bloom*. The *Bloom* court found the previous contract language misleading, and the new clause similarly misleads employees regarding their union-security obligations. Although the settlement agreements respond to the letter of the court's earlier decision by expunging the previous contract language, they fail to address the court's more fundamental concern that the union-security provision of a collective-bargaining agreement enlighten rather than confuse employees concerning the extent of their obligations to their bargaining representative.

The new clause begins with essentially the same first sentence as the unlawful clause and warns employees that they are required to become "members" of the Union. It thus misstates existing law regarding the obligations of employees toward their bargaining representative. Thirty-five years ago, in the landmark case *NLRB v. General*

Motors,[6] the Supreme Court held that under the second proviso of Section 8(a)(3), which authorizes union-security arrangements, "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." More recently, the Board and courts have repeatedly found that union-security clauses providing that employees must become union members are misleading to bargaining unit employees.[7] In *Wegscheid*, the Seventh Circuit found the clause at issue misleading even though it was "a close paraphrasing" of the language of the second proviso. Chief Judge Posner, writing for the majority, explained:

> True, it is a close and accurate paraphrase of the statute, read literally; but . . . the Supreme Court has glossed the statute to change its literal meaning, indeed virtually to invert it. Read literally, section 8(a)(3) authorizes the collective bargaining agreement to compel all the employees in the bargaining unit to join the union and pay the full union dues. As construed judicially, it authorizes no such thing; all that the collective bargaining agreement can require is the payment of the agency fee. This has been settled law for some time, and the only realistic explanation for the retention of the statutory language in collective bargaining agreements, as the courts have observed, is to mislead employees about their right not to join the union.[8]

---

[6] 373 U.S. 734, 742 (1963); see *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985); *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[7] See, e.g., *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993), enf. denied 41 F.3d 1532 (D.C. Cir. 1994); *Wegscheid v. Auto Workers Local 2811*, 117 F.3d 986 (7th Cir. 1997); *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997).

[8] 117 F.3d at 990. In *Buzenius*, supra, the Sixth Circuit similarly found: "To permit the [collective-bargaining agreement] to say

I agree with Judge Posner's assessment. In my view, the incremental approach taken by the Respondents here, making small modifications to their contract language but at the same time retaining the apparent requirement of membership, can, as Judge Posner feared, have no other purpose and effect than to mislead employees to deprive them of their *General Motors* rights.

Moreover, the remaining provisions of the new clause cannot cure the defect of the opening sentence and may, in fact, exacerbate its unlawful effect. By stating that "membership is required only to the extent that," the second sentence implies that the categories of "regular service fee payer" and "objecting service fee payer" describe different *levels* of membership, rather than *alternatives* to membership. Nowhere does the clause inform, or even suggests to employees, that they may choose to be *nonmembers*, a vital right explicitly protected by Section 7 of the Act, and that a nonmember merely owes a certain financial obligation to the Union, which may be satisfied in either of two ways. Furthermore, the Board should not rationalize away this defect by finding that the Respondents, having misinformed employees of their obligations in the first sentence, adequately remedy the unlawful effect in the "fine print."

The approval of settlement agreements containing this language represents a step backward in the Board's efforts to define and elucidate the rights and obligations of employees with respect to their bargaining representatives and the duties of unions toward the employees they represent and whose financial support they can require under the narrow authority conferred by the Act. This result cannot be reconciled with the clear message of recent court decisions, including that of the Eighth Circuit in *Bloom*.

---

what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation." 124 F.3d at 792.

Moreover, by approving the settlement agreements, the majority essentially permits the Union to make an "end run" around its responsibilities to unit employees by seeking, and now obtaining, the Board's imprimatur on language that, if litigated based on an alleged violation of Section 8(b)(1)(A), would be deemed a breach of its statutory obligation. In my view, it is unwise for the Board to permit the settlement process to become a mechanism for obtaining the Board's imprimatur, in advance and without the benefits of litigation, on language that may be the subject of future unfair labor practice proceedings.

J. Robert Brame III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX D

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 18-CA-12025 and 18-CB-3144

GROUP HEALTH, INC. *and* GARY BLOOM

OFFICE OF PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12 *and* GARY BLOOM

February 27, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On January 26, 1993, the National Labor Relations Board approved the stipulation of facts in this case and transferred the proceeding the Board. The General Counsel requested and received several extensions of time in which to file briefs on the merits because settlement negotiations were underway. On May 10, 1993, the General Counsel filed with the Board a motion for approval of settlement agreements, stating that the Respondent Union and the Respondent Employer had executed informal settlement agreements, but that the Charging Party had refused to become a party to those agreements. The Board granted the motion and approved the settlement agreements by Order dated September 29, 1993.[1]

On July 27, 194, the Eighth Circuit Court of Appeals issued a decision denying enforcement of the Board's

---

[1] Because the Board approved the settlements, briefs on the merits have never been filed with the Board.

Order approving the settlement agreements and remanded the case to the Board. *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994). By letter dated September 8, 1994, the Board informed the parties that it accepted the remand from the court, and that all parties could file statements of position with respect to the issues raised by the remand. Both the Union and the Employer filed position statements requesting that the Board defer the matter to allow the parties to negotiate revised settlement agreements that would comport with the Eighth Circuit's decision. The Charging Party filed a statement of position seeking a Board Order that would include broad remedial provisions as well as a provision expunging the offending language.

On June 2, 1995, the General Counsel filed a second motion for approval of settlement agreements, indicating that the Employer and the Union had executed revised informal settlement agreements. The General Counsel and the Union filed briefs in support of the motion for the approval of the revised settlement agreements, and the Charging Party filed a brief in opposition to the motion. The Charging Party refuses to be a party to these agreements, maintaining that they suffer from the same deficiencies as the original settlements.

The Stipulation of Facts

The stipulation of facts indicates that the Respondent Union and the Respondent Employer were, at all relevant times, parties to a collective-bargaining agreement that contained a union-security clause requiring that employees become "members in good standing" as a condition of employment. The stipulation further indicates that the Employer withheld union dues and initiation fees from the pay of Charging Party Gary Bloom without his authorization and remitted this money to the Union. It is also stipulated that Bloom declined to become a member of the Union, and that the Union indicated to him that

if he did not become a member, it would seek to terminate his employment. Finally, the stipulation states that since June 23, 1991 (the statutory limitation date), the Union has failed to inform newly hired and nonmember employees of their rights under *Comunication Workers v. Beck*, 487 U.S. 735 (1988).

The Original Settlement Agreements

The original settlement agreements provided that the Employer and the Union would post separate notices indicating that they would not bargain for, maintain, or enforce and would not give effect to, the provision in their contract requiring employees to become "members in good standing" as a condition of employment, unless that provision also provided that they need only pay the Union's periodic dues and initiation fees. The settlements also stated that the Union would provide all employees hired after June 23, 1991, all newly hired employees, and all nonmember employees notice of their *Beck* rights.

The Union further agreed under the settlements to inform employees through its notice that it would not threaten to or seek the discharge of any employee until they had been given the above notice of their *Beck* rights, and would not threaten to or seek the discharge of any employee who objected, under *Beck*, to paying full union dues and fees. The settlements additionally provided that the Union would reimburse all employees hired after June 23, 1991, all new hires, and all nonmembers who object to paying full union dues and fees the amount of dues and fees spent on the Union's nonrepresentational activities since June 23, 1991. Finally, the settlements indicated that the Charging Party had been reimbursed for the union dues and fees the Employer withheld from his pay without a valid checkoff authorization.

Bloom v. NLRB

In *Bloom v. NLRB*, the Eighth Circuit denied enforcement of the Board's Order solely on the ground that

"[b]ecause the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in this case requires expunction of the offending clause." *Bloom*, 30 F.3d at 1005. The court rejected the Board's position that the original settlements adequately remedied the alleged violations because the charged parties agreed to post notices that they would no longer give effect to the contract provision requiring that all employees become and remain members in good standing in the Union as a condition of employment, unless that provision also provided that employees need only pay the Union's periodic dues and initiation fees. *Bloom*, 30 F.3d at 1004.

The court acknowledged that employees may be able to determine the lawful extent of their union obligation during the notice-posting period, but noted that employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the [proposed] notice seemed to imply. Rather . . . employees need only pay that portion of union dues and fees attributable to the union's representational activities." 30 F.3d at 1004-1005 (citing *Beck*, 487 U.S. at 762-763). Further, the court noted that after the expiration of the 60-day notice-posting period, the settlement agreements did not provide for any measures to inform employees "that the lawful extent of their union obligation is actually much less than the clause states." The court expressed its concern that "[w]hile some employees may recall the notice [after the posting period], there is no guarantee that all will." Id. at 1005. The court concluded that "because a literal application of the 'member in good standing' language is unlawful, posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect Group Health's employees' [S]ection 7 right to refrain from union activities." Id. Accordingly, the court reasoned that the clause must be expunged.

The Revised Settlement Agreements

The revised settlement agreements are identical to the original settlements with the addition of certain affirmative provisions. The Union agreed to a revised settlement agreement and notice that provides that the Union "will amend our contract with the Employer to delete the provision requiring that employees become members in good standing and substitute a provision that provides that union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees." The Union's revised settlement agreement also provides that the Union "will notify each employee in the bargaining unit in writing that we have modified our contract with the Employer as described."

The Employer agreed to a revised settlement agreement and notice that provides that the Employer "will amend our contract with the Union to delete the provision requiring that employees become members in good standing and substitute a provision that provides that Union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees."

The Positions of the Parties

The General Counsel and the Union urge the approval of the revised settlement agreements, asserting that the sole basis of the Eighth Circuit's opinion remanding the case to the Broad was that the offending union-security clause language was not expunged and that the expunction required by the revised settlement agreements fully meets the concerns raised by the Eighth Circuit. The General Counsel and the Union also maintain that the classwide reimbursement of all dues and initiation fees requested by the Charging Party is inappropriate. In its brief, the Union asserts that the classwide reimbursement of dues is impermissibly punitive both because the record lacks any evidence of employees electing to become union members as a result of the alleged coercion, and because

it calls for the reimbursement of the representationally expended percentage of dues and fees to which the Union is lawfully entitled.

The Charging Party argues that the revised settlement agreements are deficient in two respects. First, the Charging Party asserts that the language that the revised settlements would substitute for the "member in good standing" requirement is unaceptable because the statement that "employees must pay the union's periodic dues and initiation fees" was also rejected by the Eighth Circuit in its decision. Second, the Charging Party maintains that the revised settlements are deficient because they do not provide appropriate monetary relief for all similarly situated employees in the unit. The Charging Party asserts that because the unlawful union membership agreement was maintained and enforced since June 23, 1991, and no information was provided to newly hired employees or nonmember unit employees of their *Beck* rights, the only appropriate remedy is for complete restitution of all dues and fees paid to the Union to be made to each employee in the unit.

California Saw and Weyerhaeuser Paper

The Board has issued two lead cases addressing the ramifications of the *Beck* decision under the NLRA. In *California Saw & Knife Works*, 320 NLRB 224 (1995), the Board held that the union violated its duty of fair representation by failing to provide notice of *Beck* rights to newly hired unit employees covered by a union-security clause who were not members of the union. The Board stated that when or before the union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to in-

teligently decide whether to object; and (3) to be apprised of any internal union procedure for filing objections. Further, if the employee objects, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures. Id. at 233.

While *California Saw* addressed the rights of nonmember employees under *Beck*, in *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, 320 NLRB 349 (1995), the Board held that *all* unit employees covered by a union-security clause, including those who are current union members, must be informed of their rights under *General Motors*[2] to refrain from becoming full union members, and their *Beck* rights to pay only that portion of union dues and fees which is germane to the union's role as the collective-bargaining representative. The Board held that current members must be told of their *General Motors* rights if they have not previously received such notice, in order to be certain that they have voluntarily chosen full membership and a concomitant relinquishment of *Beck* rights.[3] The Board explained that "[t]hese notice requirements furnish significant protection to the interests of the individual unit employee vis-a-vis *Beck* rights, without compromising the countervailing collective interests of bargaining unit employees in ensuring that every unit emactivities." Id.

Approval of the Revised Settlements

After careful consideration, the Board has decided to approve the revised settlement agreements because we find that they are reasonable and appropriate under *Independent Stave*, 287 NLRB 740, 743 (1987), they conform to the intent of the Eighth Circuit's decision, and they comport with the Board's recent decisions in *Cali-*

---

2 373 U.S. 734 (1963).

3 *Weyerhaeuser*, 320 NLRB at 349.

fornia Saw and *Weyerhaeuser*. In *Independent Stave* the Board set forth the factors it would examine in determining whether to approve a settlement agreement:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Applying these factors and considering all the circumstances, we have determined that the revised settlements effectuate the purposes and policies of the Act.

The Respondents have agreed to be bound by the revised settlement agreements, and the General Counsel urges their approval. Although the Charging Party opposes the revised settlements, where the other factors in *Independent Stave* are met and where the other parties in the case agree to be bound to the settlements, the Board is not precluded from approving a settlement agreement over the objections of a Charging Party. See, e.g., *Shine Building Maintenance*, 305 NLRB 478 (1991).

We find that the other factors in *Independent Stave* are met. The revised settlements are reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. The revised settlement agreements actually provide more than what the Board would require under *California Saw* and *Weyerhaeuser Paper*. Thus, although the Charging Party argues that there are no risks of litigation because of the

stipulated record in this case, there is a risk that under current Board precedent, the Board Order could require even less (that is, no expunction) than what the revised settlements provide. In addition, there is no allegation by any party that the revised settlements are a product of fraud, coercion, or duress, nor is there any evidence that the Respondents have engaged in a history of violations of the Act or have breached previous settlement agreements resolving unfair labor practice disputes.

The Union-Security Clause Language

In addition, we find that the concerns about the original settlements expressed by the Eighth Circuit in *Bloom* have been rectified. First, we note that the language objected to by the court has been deleted and different language substituted. The Charging Party argues that the substitute language, providing that "union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees," is as unacceptable under *Bloom* as the "members in good standing" language in the original settlements. The Charging Party points to language in the court's opinion stating that "employees subject to a union-security clause cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees." *Bloom*, 30 F.3d at 1004-1005 (citations omitted, emphasis in the original).

We note, however, that the reason given by the Eighth Circuit for requiring expunction of the "members in good standing" language is that the union-security clause language was unlawfully interpreted and applied.[4] We find

---

[4] In *Electronic Workers IUE v. NLRB*, 41 F.3d 1532 (1994), the D.C. Circuit considered, in effect, an identical union-security clause and squarely faced the question of whether a union acted in bad faith by maintaining a union-security clause that did not include notice of *Beck* rights on its face. The court found that the union-security clause was facially valid and that the union did not violate its duty of fair representation, because there was no evidence

that the substitute language in the collective-bargaining agreement is acceptable because the statement that "Union membership is required only to the extent that employees must pay the Union's periodic dues and initiation fees" has not been unlawfully interpreted or applied. Although it is not a full recitation of an employee's rights under *Beck*, the Board does not require such notice in a collective-bargaining agreement under either *California Saw* or *Weyerhaeuser*.

Rather, under *Weyerhaeuser*, the Union now has an affirmative obligation to inform all unit employees of their rights under *General Motors* and *Beck* to refrain from full union membership as well as the right to pay only those dues and fees that are attributable to the union's representational expenses. This obligation had not been specifically set forth in a Board decision prior to *Weyerhaeuser*. With the issuance of *Weyerhaeuser*, the Board requires a union to provide this additional level of information and protection of employees' rights. In light of the fact that the court required the expunction of the union-security clause language because that language had been unlawfully interpreted and applied and in light of the affirmative obligation imposed on unions by *Weyerhaeuser* to inform all employees of the statutory limits on union-security clause obligations, we do not consider the substituted language to be an impediment to our approval of the revised settlement agreements.

Further, we note that the substitute language is taken from the Supreme Court's opinion in *NLRB v. General*

---

that the union had ever attempted to enforce the clause unlawfully. Moreover, the court held that "*Beck* speaks only to the level of dues an employee may lawfully be required to pay under a union security agreement" not to the question of what language is permissible in such an agreement. Id. at 1539. Chairman Gould expresses no view on the court's holding in *Electronic Workers IUE v. NLRB*.

Motors, 373 U.S. 734, 742 (1963), where the Court held that the "burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." This phrase also tracks the language of Section 8(a)(3) of the statute which provides "[t]hat no employer shall justify any discrimination against an employee for non-membership in a labor organization . . . if he has reasonable ground for believing that membership was denied or terminated for reasons other than the failure of an employee to tender the periodic dues and the initiation fees uniformly required as a condtion of acquiring or retaining membership." In addition, to the extent that the Eighth Circuit is concerned that "members in good standing" is misleading, the substitute language serves to alert the employees to the fact that something other than full union membership is required under the union-security provision. That alert, together with the expunction of the offending language, notice to the unit employees of the expunction, and the notice of *Beck* rights required to be given to all unit employees under our recent decisions, will ensure that the unit employees here are well informed of their statutory rights under the contractual union-security clause.[5]

---

[5] In questioning the reason for and the extent of the Eighth Circuit's opinon in *Bloom*, the Seventh Circuit recently stated in *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1114, 1115 (7th Cir. 1996):

> The context in which the Eighth Circuit faced the facial validity issue was quite different, and thus it is not clear whether the Eighth Circuit would disagree with the D.C. Circuit [holding in *Machinists v. NLRB*, 41 F.3d 1532 (1994)] if confronted with the same fact situation that was before the latter. [See fn. 4, supra.]
>
> . . . .
>
> Because the union [in *Bloom*] had apparently taken no steps to assure the rights of *Beck* objectors, the Eighth Circuit was not faced with the question whether a general union security clause, coupled with adequate notice or actual awareness of

Second, with respect to the posting of a temporary notice, the Eighth Circuit expressed a specific concern that because the language in the collective-bargaining agreement was unlawfully interpreted and applied, the posting of a temporary notice stating that the offending language would not be enforced would not serve to keep employees apprised of their rights after the conclusion of the 60-day posting period. As noted above, the revised settlements provide that the offending language be expunged from the parties' collective-bargaining agreement, that new language be substituted, and that the unit employees be notified in writing that this has been done. In addition, the revised settlements still provide that a notice setting forth employees' *Beck* rights will be posted for 60 days, and that any employee who wishes to exercise his or her *Beck* rights will be reimbursed the amount of dues and fees spent on the Union's nonrepresentational activities since June 23, 1991.

Further, under *California Saw*, the Board now requires that newly hired employees be given notice of their *Beck*

Beck rights, would have been sufficient to satisfy the duty of fair representation.

. . . .

We agree with the D.C. Circuit and the NLRB that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses. . . . Under *Beck*, the critical questions instead are whether the union is spending money on activities going beyond the scope of core representational matters, and if it is, how the union is assuring that the rights of potential fee objectors will be respected. Because the Eighth Circuit was not presented with an alternative mechanism for assuring those rights in the *Bloom* case, it is unclear at best whether it would find that only a modification of the union security clause itself would suffice to protect objecting employees. (In our view, therefore, the district court in Minnesota may have over-read *Bloom* in its decision in *Schreier v. Beverly California Corp.*, 892 F.Supp. 225 (D.Minn. 1995), when it concluded that the Eighth Circuit rule squarely forbids unqualified union security clauses.) . . . .

rights before or at the time the union seeks to obilgate them under a union-security provision. Accordingly, as new employees enter the unit, they will introduce into the unit a continuing awareness of *Beck* rights. With the removal from the collective-bargaining agreement of the language that the court held had been unlawfully interpreted and applied and in light of the written notice sent out to each unit member that the language has been expunged and new language substituted, as well as the requirement under *Weyerhaeuser* that all unit employees be notified of their *Beck* rights, we believe that the court's concerns about the adequacy of a temporary notice posting have been met.[6]

Scope of the Remedy

The Charging Party argues that the scope of the remedy is inadequate because it does not reimburse all unit employees for all dues and initiation fees paid to the Union since June 23, 1991.[7] The General Counsel asserts there is no evidence that any employee, other than the Charging Party, suffered any economic loss because of that employee's reliance on the provisions of the union-security clause. The revised settlement agreements indicate that the Charging Party has been reimbursed all dues and fees that were unlawfully withheld from his wages. Further, the General Counsel argues, even if the Employer and the Union had maintained a union-security clause with language acceptable to the Charging Party,

---

[6] Member Higgins would require that a union send out *Beck-GM* notices once a year, at least where a union requires that *Beck* objections must be renewed each year in order to remain effective. See *California Saw & Knife Works*, 320 NLRB 224, 231 fn. 41 (1995). Thus, even after the posting period is over, periodic notices would continue to issue. Although this requirement has not been adopted by his colleagues, Member Higgins agrees that the settlement is adequate under *Independent Stave*.

[7] The Eighth Circuit, in fn. 2 of its decision, indicated that "having concluded that the Board should not have approved the settlement agreements because they do not expunge the union security clause, we need not consider the other grounds upon which Bloom challenges the agreements." 30 F.3d at 1005 fn. 2.

the Union would have been able to collect that portion of its dues related to its representational activities from objecting employees. The revised settlements do provide that all employees who became members of the Union during the statutory limitation period may register an objection to full membership in the Union and will be reimbursed for that portion of the dues and fees they have paid that are not attributable to the Union's representational activities.

In *Weyerhaeuser*, the Respondents excepted to the judge's recommended remedial requirement that it reimburse the charging party for all dues collected since his resignation from membership and filing of a *Beck* objection. The Board held that the union was required to reimburse only those dues determined to be in excess of the amount that the union could lawfully collect under *Beck*. 320 NLRB at 349 fn. 4.[8] Accordingly, in light of all these factors, we find that the scope of the remedy set forth in the revised settlements is adequate and that it will effectuate the purposes and policies of the Act to approve the revised settlement agreements.

ORDER

The Board, having duly considered the matter, orders that the General Counsel's motion is granted and the complaint is dismissed in its entirety, and the case is remanded to the Regional Director for Region 18 for further appropriate action.

Dated, Washington, D.C. February 27, 1997

William B. Gold IV, Chairman

Margaret A. Browning, Member

John E. Higgins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] See *Gilpin v. State County Employees AFSCME*, 875 F.2d 1310, 1314-1316 (7th Cir. 1989).

APPENDIX E

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 93-3483

GARY A. BLOOM,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Submitted April 14, 1994
Decided July 27, 1994

Before WOLLMAN, MAGILL, and BEAM, Circuit Judges.

WOLLMAN, Circuit Judge.

Gary A. Bloom petitions for review of an order of the National Labor Relations Board ("the Board"). We reverse and remand to the Board for further proceedings.

I.

In June 1991, Bloom was employed by Group Health, Inc., as a clerical worker. The Office and Professional Employees International Union, Local 12 ("Local 12") was the exclusive bargaining representative of Group Health's clerical employees. The collective bargaining agreement between Group Health and Local 12 contained a union security clause:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

On September 27, 1991, Group Health withheld union dues and initiation fees from Bloom's paycheck without his authorization. Local 12 then sent Bloom a letter requesting that he complete and sign a membership application and a voluntary dues checkoff card. In response, Bloom informed Local 12 that he had not completed the membership application or dues checkoff card because he first wanted a breakdown of how the union dues were spent. Local 12 provided Bloom with a categorization of union expenditures, but it did not inform Bloom of the percentage of union dues and fees that was spent on nonrepresentational activities. Nor did Local 12 advise Bloom that he could object to having union dues and fees spent on nonrepresentational activities and be charged only the percentage spent on representational activities. Instead, Local 12 advised Bloom that the collective bargaining agreement required that he be a member of the union and that if he did not complete the membership application and the dues checkoff card Local 12 would request that Group Health terminate him. During the remainder of 1991, Group Health continued to withhold union dues and fees from Bloom's paycheck. On January 30, 1992, however, Local 12 refunded to Bloom in full the amounts that had been withheld from his paychecks without authorization.

Bloom filed unfair-labor-practice charges against Group Health and Local 12 on December 23, 1991. The charges alleged that Group Health and Local 12 had violated Bloom's rights and the rights of similarly situated employees under the National Labor Relations Act by negotiating and enforcing a provision of a collective bargaining agreement requiring employees to become and remain

union members in good standing as a condition of employment and by withholding union dues and fees from Bloom's paycheck without his authorization. The charges further alleged that Local 12 had failed to advise employees of the percentage of dues spent on nonrepresentational activities and of their right to become objecting nonmembers.

The Board's General Counsel isued a consolidated complaint on Bloom's charges. Waiving a hearing before an administrative law judge, the parties entered into a stipulation of facts and filed a motion to transfer the proceedings to the Board, which the Board granted. While the charges were pending before the Board, Group Health and Local 12 entered into settlement agreements which the General Counsel concluded remedied the alleged unfair labor practices. The General Counsel then filed with the Board a motion for approval of the settlement agreements. Bloom was not a party to the settlement agreements, and he opposed the motion for approval. The Board entered an order approving the settlement agreements and dismising the complaint. Bloom then filed this petition for review.

II.

Bloom challenges the Board's order approving the settlement agreements on several grounds. We first consider his argument that the agreements should not have been approved because they do not expunge the union security clause that gave rise to Bloom's unfair-labor practice charges.

The Board has a longstanding policy of encouraging the settlement of labor disputes. *NLRB v. International Bhd. of Elec. Workers, Local Union 112*, 992 F.2d 990, 992 (9th Cir.1993). Despite this policy, however, the Board is not required to approve all settlement agreements, even if the General Counsel advocates approval. *Independent Stave Co.*, 287 N.L.R.B. 740, 741 (1987). "Settlement is not an end in and of itself, however. Of primary importance is the broad authority vested in the

Board under Section 10(c) of the Act to prevent and remedy unfair labor practices." *Pottsville Bleaching & Dyeing Co.*, 301 N.L.R.B. 1095, 1095 (1991). The Board will not approve a settlement that does not effectuate the purposes and policies of the Act. *Independent Stave*, 287 N.L.R.B. at 741.

In deciding whether to approve a settlement, the Board examines various factors:

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous agreements resolving unfair labor practice disputes.

Id. at 743. Applying these factors and considering all the circumstances, we must decide whether the settlements that the Board approved effectuate the purposes and policies underlying the Act.[1]

One of the policies of the Act is voluntary unionism. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 104, 105 S.Ct. 3064, 3069-70, 87 L.Ed.2d 68 (1985). To elimi-

---

[1] We can only assume that the Board determined that the agreements furthered the purposes and policies underlying the Act, for the Board's order approving the agreements does not explain the Board's rationale or discuss the *Independent Stave* factors. Because we conclude that the Board should not have approved the settlements, however, we need not decide whether the Board's failure to explain its reasoning necessitates remand. *Cf. Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 274 (D.C.Cir. 1986) (remanding case to Board because order did not explain the Board's reasons for approving settlement).

nate "the serious abuses of compulsory unionism", Congress, in the Taft-Hartley Act of 1947, abolished closed shop agreements, which required that employers hire only persons who were union members. *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41, 83 S.Ct. 1453, 1458, 10 L.Ed.2d 670 (1963). Congress recognized, however, that "without such agreements, many employees would reap the benefits that unions negotiated on their behalf without in any way contributing financial support to those efforts." *Communications Workers v. Beck*, 487 U.S. 735, 748, 108 S.Ct. 2641, 2650, 101 L.Ed.2d 634 (1988). Congress therefore included a provision permitting union security clauses to ensure that there would be no employees who received the benefits of union representation without paying for them. *Oil, Chem. & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 416, 96 S.Ct. 2140, 214-45, 48 L.Ed.2d 736 (1976). Section 8(a)(3) provides in part, "[t]hat nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." 29 U.S.C. § 158(a)(3).

In accordance with Congress's intent, the Supreme Court has held that the only aspect of union membership that can be required as a condition of employment pursuant to a section 8(a)(3) union security provision is the payment of dues. *Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 n. 16, 105 S.Ct. 3064, 3071 n. 16, 87 L.Ed.2d 68 (1985) (citing *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 41, 74 S.Ct. 323, 336, 98 L.Ed. 455 (1954)). "Full union membership thus no longer can be a requirement of employment. If a new employee refuses formally to join a union and subject himself to its discipline, he cannot be fired." *Id.* at 106, 105 S.Ct. at 3071. Moreover, an

employee's obligation under a union security clause to pay unions dues and fees is limited. In *Communications Workers v. Beck*, the Supreme Court held that section 8(a)(3) does not permit a union to exact funds from objecting nonmember employees for any activities unrelated to its duties as an "exclusive representative of the employees in dealing with the employer on labor-management issues." 487 U.S. 735, 762-63, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988) (quoting *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984)). Thus, an employee cannot be obligated as a condition of employment to support "union activities beyond those germane to collective bargaining, contract administration, or grievance adjustment." *Id.* at 745, 108 S.Ct. at 2648.

Although a union security clause cannot be used as "an instrumentality for the indirect enforcement of nonfinancial union regulations," *Local 54, Hotel Employees & Restaurant Employees Int'l Union (Atlantis Casino Hotel)*, 291 N.L.R.B. 989, 992 (1988), the clause at issue in this case, specifically the "member in good standing" language, implies otherwise. An employee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says—"[membership] in good standing in the Union." We fail to see how an employee can discern from such language that he cannot be terminated if he does not wish to become a formal, full-fledged union member burdened with all of the obligations of union membership and subject to the full reach of the union's disciplinary measures. Indeed, the Board has recognized that language in a union security clause requiring that employees become and remain "members of the Union in good standing" is ambiguous, and at a minimum, leaves employees confused about the extent of their obligation. *International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers, Engineers Local 444 (Paramax Systems Corp.)*, 311 N.L.R.B. 1031, 1037 (1993), *petition*

for review pending, No. 93-1373 (D.C.Cir.). According to the Board, such a clause

> fails to apprise employees of the lawful limits of their obligation. Indeed, a literal reading of the clause would lead an employee unversed in labor law to believe that employees were obliged to join the Union and satisfy all of the requirements for membership as a condition of employment. This literal reading of the clause would chill the exercise of employees' Section 7 rights to refrain from union membership and support.

Id. at 1041.

Local 12 did in fact literally interpret the union security clause and threaten to seek Bloom's termination if he did not become a union member. Section 8(a)(3), as interpreted by the Supreme Court, however, does not permit such threats. Accordingly, we conclude that the settlement agreements are inadequate, for they do not delete the misleading union security cause that the charged parties unlawfully interpreted and applied.

The Board contends that the settlement agreements adequately remedy the violations alleged in the complaint because the charged parties agreed to post notices informing employees that they would "no longer give effect to the provision in [the] contract . . . that requires employees become and remain 'members in good standing' as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees." During the sixty-day period for which the agreements require that the notices be posted, the employees may be able to determine the lawful extent of their union obligation. We note, however, that employees subject to a union security clause cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the above notice seems to imply. Rather, to protect themselves from discharge pursuant to a union security clause, employees

need only pay that portion of union dues and fees attributable to the union's representational activities. *Beck*, 487 U.S. at 762-63, 108 S.Ct. at 2657. After the expiration of the sixty-day notice period, the agreements provide for no measures to inofrm employees that the lawful extent of their union obligation is actually much less than the clause states. While some employees may recall the notice, there is no guarantee that all will. Thus, because a literal application of the "member in good standing" language is unlawful, posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect Group Health's employees' section 7 right to refrain from union activities.

Because the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy in this case requires expunction of the offending clause.[2] Accordingly, we deny enforcement of the Board's order approving the settlement agreements and dismissing the consolidated complaint and remand the case to the Board for further proceedings consistent with this opinion.

---

[2] Having concluded that the Board should not have approved the settlement agreements because they do not expunge the union security clause, we need not consider the other grounds upon which Bloom challenges the agreements.

APPENDIX F

Minneapolis, Mn

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 18-CA-12025

GROUP HEALTH, INC.

and

GARY A. BLOOM, an Individual

Case 18-CB-3144

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, Local 12

and

GARY A. BLOOM, an Individual

ORDER GRANTING MOTION AND
APPROVING SETTLEMENT AGREEMENT

On September 11, 1992, the parties to this proceeding, Gary A. Bloom, the Charging Party, Office and Professional Employees International Union, Local 12 (Respondent Union), Group Health Inc., (Respondent Employer), and counsel for the General Counsel, filed with the Board in Washington, D.C. a Motion to Transfer Proceedings to the Board and a Stipulation of Facts. This Motion was granted by Order dated January 26, 1993.

On May 10, 1993, the General Counsel, by counsel, filed with the Board in Washington, D.C., a Motion for Approval of Settlement Agreements. The Motion stated that the Respondent Union and the Respondent Employer have executed informal settlement agreements. The Charging Party has refused to become a party to the settlement agreements because of its objections to the terms contained therein.

Counsel for the General Counsel states that the General Counsel has concluded that the settlement agreements executed by the Respondents effectively remedy all conduct alleged as unfair labor practices in the Consolidated Complaint, as amended, and requests that the Board issue an order approving the settlement agreements and dismissing the Complaint. The Respondent Employer and the Respondent Union support approval of the settlement agreements.

The Charging Party opposes the General Counsel's Motion, maintaining that the settlement agreements are deficient because they do not call for broad relief to all unit employees and do not call for expunction of the entire union security provision at issue.

The Board, having duly considered the matter,

IT IS ORDERED that the General Counsel's motion is granted and the Complaint be dismissed in its entirety.

IT IS ORDERED that the above-entitled proceeding is remanded to the Regional Director for Region 18 for further appropriate action.

Dated, Washington, D. C., September 29, 1993.

By direction of the Board:

JOSEPH E. MOORE
Deputy Executive Secretary

Supreme Court, U.S.
FILED
DEC 22 1998
OFFICE OF THE CLERK

No. 98-909

In the Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12, PETITIONER

v.

GARY A. BLOOM AND THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether a union security clause that tracks the language of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), is facially valid.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bloom v. *NLRB*, 30 F.3d 1001 (8th Cir. 1994)	7
Buzenius v. *NLRB*, 124 F.3d 788 (6th Cir. 1987), vacated and remanded, 119 S. Ct. 442 (1998)	5, 7
Communications Workers of Am. v. *Beck*, 487 U.S. 735 (1988)	3
Independent Stave Co., 287 N.L.R.B. 740 (1987)	4
Marquez v. *Screen Actors Guild, Inc.*, 119 S. Ct. 292 (1998)	6, 7, 8, 9
NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963)	2
Patter Makers' League of N. Am. v. *NLRB*, 473 U.S. 95 (1985)	2-3

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3)	2, 3, 6, 7, 8, 9
§ 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A)	3, 7
§ 8(b)(2), 29 U.S.C. 158(b)(2)	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-909

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12, PETITIONER

v.

GARY A. BLOOM AND THE
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals of which petitioner seeks this Court's review (Pet. App. 1a-14a) is reported at 153 F.3d 844. The supplemental decision and order of the National Labor Relations Board (NLRB or Board) at issue in that opinion (Pet. App. 18a-41a) is reported at 325 N.L.R.B. No. 49. An earlier NLRB decision and order in this case (Pet. App. 42a-55a) is reported at 323 N.L.R.B. 251. The initial decision of the court of appeals in this case (Pet. App. 56a-63a) is reported at 30 F.3d 1001. The NLRB's initial order in this case (Pet. App. 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1998. Pet. App. 15a-16a. Petitions for rehearing and suggestions for rehearing en banc were denied on October 15, 1998. Pet. App. 17a. The petition for a writ of certiorari was filed on December 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." That same paragraph, however, permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." The paragraph further provides that membership must be equally available to all employees on the same terms and conditions and may require employees to do no more than "tender the periodic dues and the initiation fees uniformly required."

This Court has held that, under that paragraph, "'[m]embership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). All that may be required as a condition of employment is "payment of initiation fees and monthly dues." *Ibid.* An employee may resign full union membership without suffering discharge and may not be discharged for failing to abide by union rules or policies with which he disagrees. *Pattern Makers' League of N. Am.* v. *NLRB*, 473 U.S.

95, 106 (1985). Finally, this Court has made clear that employees who are not full union members need not pay fees or dues to the extent they "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 745 (1988).

2. In 1991, respondent Gary A. Bloom filed unfair labor practice charges with the NLRB against his former employer, Group Health, Inc., and his former collective bargaining representative, petitioner Office and Professional Employees International Union, Local 12 (Union). Pet. App. 8a, 57a. Based on those charges, the NLRB General Counsel issued a complaint against Group Health and the Union. *Id.* at 58a. The complaint alleged that Group Health had violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. 158(a)(1) and (3), and the Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2). The allegedly unlawful conduct comprised (1) Group Health's and the Union's maintaining and enforcing in their collective bargaining agreement a union security clause that required covered employees to "become and remain members in good standing in the Union" as a condition of employment; (2) the Union's failure to advise covered employees of the right to refrain from full union membership and instead to pay agency fees, as well as the right of an agency fee payer to object to paying the "nonrepresentational" portion of the agency fee; and (3) the Union's threats to terminate Mr. Bloom's employment if he declined full union membership, and the unauthorized deduction of dues from Mr. Bloom's wages. Bloom C.A. App. 23-24.

Rather than contest that complaint, Group Health and the Union each entered into a settlement agree-

ment with the NLRB General Counsel to remedy the alleged unfair labor practices. Pet. App. 58a. The parties agreed that they would not maintain a "member in good standing" union security clause without explaining in the clause that employees "need only pay the Union's periodic dues and initiation fees." Bloom C.A. App. 55, 57. The Union also agreed to inform all Group Health employees of the percentage of its expenditures spent on "non-representational activities" and of the right of agency fee payers to object to paying for those activities. *Id.* at 57. The Union agreed that it would not tell "employees that they are required to sign [a] membership application or checkoff authorization form[ ]" as a condition of employment. *Ibid.* And the parties agreed that they would not deduct dues or fees from an employee's pay without prior written authorization. *Id.* at 55, 57.[1]

Mr. Bloom, as the charging party, did not agree to the settlement agreements. Pet. App. 58a. The settlement agreements were therefore submitted by the General Counsel to the Board for review under the standards in *Independent Stave Co.*, 287 N.L.R.B. 740, 743 (1987).[2] On September 29, 1993, the Board entered an order approving the settlement agreements. Pet. App. 64a-65a.

Mr. Bloom petitioned the Eighth Circuit for review of the NLRB's decision approving the settlement agreements. Pet. App. 58a. On July 27, 1994, the Eighth Circuit reversed the Board's decision on the ground

---

[1] The dues deducted from Mr. Bloom's pay had been returned to him prior to the settlement agreements, and the Union agreed to notify the other employees of that action. Bloom C.A. App. 58.

[2] The *Independent Stave* standards are set forth at Pet. App. 49a.

that "an adequate remedy in this case requires expunction of the offending clause." *Id.* at 63a. The court of appeals "remand[ed] the case to the Board for further proceedings consistent with [the court's] opinion." *Ibid.*

3. a. On remand, the settlement agreements were revised to provide, *inter alia*, for a substitute union security clause in the collective bargaining agreement and union notice to all covered employees explaining that employees who choose to be agency fee payers have the right to object to paying the "nonrepresentational" portion of the fee and that the Union will honor objections by reducing the required agency fee and providing a detailed explanation of the basis for the reduction. Pet. App. 46a.

The substitute union security clause, which was negotiated by Group Health and the Union, included "additional explanatory language" intended to "settle this case without additional litigation * * * [by] meet[ing] the standard for union-security clauses set forth in the Sixth Circuit's *Buzenius* decision[3] even on the most strict reading of that case." Pet. App. 21a. The new clause reads as follows:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calendar days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees

---

[3] See *Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S. Ct. 442 (1998).

> which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion * * * of the Union's total expenditures that support representational activities.

Ibid.

Mr. Bloom objected to the revised settlement agreements. Pet. App. 22a. On February 2, 1998, the Board approved the agreements. *Id.* at 18a-41a. Mr. Bloom once again petitioned for review.

b. In the decision on which petitioner now seeks certiorari, the Eighth Circuit reversed the NLRB's decision approving the revised settlement agreements. Pet. App. 1a-14a. The court of appeals ruled that the "membership" language of the new union security clause is "misleading and coercive" and that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the *unqualified command* expressed in the first sentence of the challenged provision." *Id.* at 11a-12a. In remanding the case, the court of appeals instructed the Board to order the inclusion of court-specified language in the union security clause. *Id.* at 13a. The court of appeals added that "we will no longer uphold or enforce a union security clause that does not contained this language or reflect its undiluted equivalent." *Ibid.*

ARGUMENT

In *Marquez* v. *Screen Actors Guild, Inc.*, 119 S.Ct. 292, 296 (1998), this Court held that a union does not breach its duty of fair representation by negotiating a union security clause that tracks the language of Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). In so holding, the Court rejected the contention that the use

of the statutory language without an explanation in the collective bargaining agreement of this Court's interpretation of that language in *General Motors* and *Beck* rendered the clause facially invalid. 119 S.Ct. at 300-301.

The Court noted that it had "granted certiorari to resolve the conflict over the facial validity of a union security clause that tracks the language of § 8(a)(3)" (119 S.Ct. at 298-299) that existed between the Ninth Circuit's ruling (which the Court upheld in *Marquez*) and the decisions of two other courts of appeals. *Id.* at 298 (citing *Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S.Ct. 442 (1998); and *Bloom* v. *NLRB*, 30 F.3d 1001 (8th Cir. 1994), the initial decision of the court of appeals in this case). Accordingly, on November 9, 1998, the Court granted the petition for certiorari in *United Paperworkers Int'l Union* v. *Buzenius*, No. 97-945, and entered an order providing that "[the] judgment [in that case is] vacated and the case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Marquez* v. *Screen Actors Guild*." 119 S.Ct. 442 (1998).

The Union then filed this petition for review of the Eighth Circuit's decision and judgment in *Bloom*. We agree with petitioner that the Court should vacate the judgment of the court of appeals in this case and remand for further consideration in light of *Marquez*. This case arises in the context of a Board decision approving settlement agreements to remedy purported violations of Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2) allegedly committed by the employer and the Union in entering into a union security clause that tracks the language of Section 8(a)(3). This Court's decision in *Marquez* makes clear that a union security clause that

tracks the statutory language does not violate the Act. 119 S.Ct. at 300-301. Although this case differs from *Marquez* in that it does not involve an allegation that the Union breached its duty of fair representation, the decision of the court of appeals cannot be reconciled with this Court's decision in *Marquez*.

The decision of the court of appeals rests on the proposition that a union security clause that states that covered employees "shall * * * become * * * members in the Union" is "misleading and coercive," because "[i]n such a context, 'member' is not a term of 'art,' * * * but one of deception." Pet. App. 11a-12a. *Marquez* directly rejects that proposition. This Court reasoned there that "the relevant provisions of § 8(a)(3) have become terms of art; the words and phrasing of the section now encompass the rights that we announced in *General Motors* and *Beck*." 119 S.Ct. at 300-301.

In addition, the Eighth Circuit held here that a standard form union security clause tracking the language of Section 8(a)(3) is so "misleading and coercive" that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the *unqualified command* expressed in the first sentence of the challenged provision." Pet. App. 11a-12a. *Marquez* also rejects that proposition: "It is difficult to conclude," this Court held, "that a union acts in bad faith by notifying workers of their rights through more effective means of communication and by using a term of art to describe those rights in a contract workers are unlikely to read." 119 S.Ct. at 301.

Finally, the court of appeals in this case not only overturned the settlement agreements at issue but prescribed detailed contract language of its own devising to replace the negotiated language in standard-form

"membership" union security clauses. The court of appeals then declared that the Eighth Circuit "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent." Pet. App. 13a. The decision of the court of appeals cannot stand in the face of this Court's ruling in *Marquez*.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Eighth Circuit should be vacated, and the case should be remanded to that court for further consideration in light of *Marquez* v. *Screen Actors Guild, Inc.*, 119 S.Ct. 292 (1998).

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel
National Labor Relations Board

DECEMBER 1998

Supreme Court, U.S.
FILED
JAN 12 1999
OFFICE OF THE CLERK

No. 98-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,

Petitioner,

v.

GARY A. BLOOM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GLENN M. TAUBMAN
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

COUNSEL OF RECORD FOR RESPONDENT GARY A. BLOOM

January 1999

22 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where a union wilfully misused its "membership in good standing" union security clause — by pointing to the contractual language and threatening an employee with discharge if he failed to sign the membership application and become a formal union member — may the remedy for that egregious conduct include an order expunging the misused clause from the contract?

PARTIES TO THE PROCEEDINGS

The Petition lists the National Labor Relations Board as a Respondent along with Respondent Gary A. Bloom, as required by Sup. Ct. R. 12.6. However, the Board's position before the Eighth Circuit and this Court is absolutely adverse to Mr. Bloom. (*See* Brief for the National Labor Relations Board). As such, a realignment of the parties is certainly in order.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

CONCLUSION 10

APPENDICES

A. Letter from Local 12 to Gary Bloom dated October 24, 1991 ..... 1a

B. Local 12 Application for Membership 2a

C. Local 12 Voluntary Check-off Authorization and Assignment 3a

D. Letter from Gary A. Bloom to Local 12 dated October 26, 1991 ..... 4a

E. Letter from Local 12 to Gary A. Bloom dated October 31, 1991 ..... 5a

TABLE OF AUTHORITIES

Cases ***Page***

Bloom v. NLRB,
30 F.3d 1001 (8th Cir. 1997) 4, 5, 6, 7

Bloom v. NLRB,
153 F.3d 844 (8th Cir. 1998) 5, 6, 7

Buzenius v. NLRB,
124 F.3d 788 (6th Cir. 1997),
petition for cert. granted,
__ U.S. __ (1998) 4, 5, 8, 9

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 8

CWA v. Beck, 487 U.S. 735 (1988) ..... *passim*

Group Health, Inc.,
323 N.L.R.B. No. 31 (1997) 4, 5

Group Health, Inc.,
325 N.L.R.B. No. 49 (1998) 5

Marquez v. Screen Actors Guild,
119 S. Ct. 292 (1998) 7, 8, 9

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 8

Pattern Makers v. NLRB,
473 U.S. 95 (1985) 1, 4, 5, 9

Swann v. Charlotte-Mecklenburg Board of Education,
402 U.S. 1 (1971) 8

TABLE OF AUTHORITIES (cont.)

Statutory Provisions and Rules *Page*

National Labor Relations Act,
29 U.S.C. § 158(a)(3) 6

Supreme Court Rule 12.6 ii

Miscellaneous Authorities

Stern et al., *Supreme Court Practice*
(7th ed. 1993) 6

No. 98-909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,

Petitioner,

v.

GARY A. BLOOM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case concerns the implementation and enforcement of the policy of "voluntary unionism" enshrined in our labor laws. *See, e.g., Pattern Makers v. NLRB*, 473 U.S. 95, 104-07(1985); *CWA v. Beck*, 487 U.S. 735 (1988).

Respondent Gary A. Bloom ("Bloom") was employed by Group Health, Inc. ("GHI") within a bargaining unit represented by Petitioner, Office and Professional Employees International Union, Local 12 ("Local 12"). GHI and Local 12 entered into a collective bargaining agreement, effective December 1, 1990 through November 30, 1993, which contained the following compulsory union membership provision:

> Article 1 Union Recognition And Union Shop:
>
> . . . .
>
> 1.03 All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, **become and remain members in good standing in the Union**, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

(Petitioner's Appendix ("Pet. App.") 2a, emphasis added).

Local 12 never sent Bloom a notice that explained his true legal rights and obligations under this union security clause. (Pet. App. 57a). Indeed, Local 12 never informed a single soul in this bargaining unit that they had the right to opt for nonmembership and pay only reduced financial core fees under *CWA v. Beck*. Joint Stipulation of Facts, ¶ 10.[1]

Instead, Local 12 sent Bloom a letter seeking to enforce the literal terms of the "membership in good standing" provision. The letter stated:

> Our office has been informed that you are now working for Group Health, Inc. **We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union.** We need these for our records and also to send to our International Office.

---

[1] Paragraph 10 of the Joint Stipulation of Facts states, in pertinent part, "Since June 23, 1991, Respondent Union, although it is a party to and has maintained and enforced the [union security provision], has failed and refused to advise newly hired employees and other employees" of their rights to remain nonmembers and pay only reduced "financial core fees" under *CWA v. Beck*.

(Appendix to the Brief in Opposition ("Opp. App.") 1a, emphasis added; *see also* Opp. App. 2a-3a).

Bloom sent a response to Local 12 in which he explained that he had not completed the membership application or dues checkoff card because he first wanted "an itemization of how union dues were spent." He also requested reimbursement of the dues that had already been withheld from his wages and paid to Local 12 without his authorization. (Opp. App. 4a).

Local 12 replied by making the following demands and threats:

> As stated in the New Member Packet, **it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty-one days after you are hired. If you choose not to be a member of Local 12, I shall have no alternative but to request GHI that your employment be terminated.** It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

(Opp. App. 5a-6a, emphasis added; Pet. App. 3a).

In the face of this explicit threat to his employment, and the seizure of dues from his salary by GHI without any signed authorization, Bloom filed unfair labor practice charges with the National Labor Relations Board ("NLRB" or "Board") against GHI and Local 12. The NLRB General Counsel issued a formal Complaint against GHI and Local 12.

The parties entered into a Joint Stipulation of Fact, and filed a Motion To Transfer Proceedings To The Board. The Board entered an Order Granting Motion, Approving Stipulation and Transferring Proceedings To The Board. While the case was pending before the Board, GHI and Local 12 entered into a unilateral settlement with the General Counsel, over Bloom's

objections. The General Counsel, GHI and Local 12 then sought the Board's approval of that settlement. Bloom objected and asserted that the remedial portions of the Settlement Agreement were inadequate, since the union had wilfully used the language of the union security clause to try to coerce him into membership. (Opp. App. 5a-6a; Pet. App. 3a). On September 29, 1993, the Board entered an Order Granting Motion and Approving Settlement Agreement. (Pet. App. 64a).

Bloom then filed a Petition for Review with the United States Court of Appeals for the Eighth Circuit. In *Bloom v. NLRB*, 30 F.3d 1001 (1997) (Pet. App. 56a) ("*Bloom I*"), the Eighth Circuit upheld Bloom's objections, ruling that the settlement agreement was inadequate under *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), and *CWA v. Beck*, 487 U.S. 735 (1988).

The Eighth Circuit took note of the union's egregious conduct, recognizing that "Local 12 did in fact literally interpret the union security clause and threaten to seek Bloom's termination if he did not become a union member." (Pet. App. 62a). It therefore held that, "*because* the overly broad union security clause was unlawfully interpreted and applied, *an adequate remedy in this case* requires expunction of the offending clause." (Pet. App. 63a, emphasis added). The Eighth Circuit remanded the case to the Board for the entry of a remedy consistent with its opinion. *Id.*

After the remand, GHI and Local 12 negotiated a second unilateral settlement with the General Counsel. Bloom again objected, asserting that this settlement, too, was inadequate. Over his objections, the Board approved this second settlement, and dismissed the Complaint. *Group Health, Inc.*, 323 N.L.R.B. No. 31 (1997). (Pet. App. 42a). Believing that this settlement still failed to properly remedy the union's misuse of its "membership in good standing" clause, Bloom filed a second Petition for Review with the Eighth Circuit.

After the briefs on the merits were filed with the Eighth Circuit, the Court of Appeals for the Sixth Circuit issued its

decision in *Buzenius v. NLRB*, 124 F.3d 788 (1997). Shortly thereafter, the Board asked the Eighth Circuit to remand this case "for reconsideration... in light of the recent decision of the Sixth Circuit in *Buzenius v. NLRB*." On November 4, 1997, the Eighth Circuit granted the Board's Motion to Remand, but retained jurisdiction and gave the Board 90 days to reconsider *Group Health, Inc.*, 323 N.L.R.B. No. 31, in light of *Buzenius*.

On February 2, 1998, the Board issued a sharply divided decision on reconsideration. *Group Health, Inc.*, 325 N.L.R.B. No. 49. (Pet. App. 18a). The Eighth Circuit then reinstated the Petition for Review, and issued its second decision in this case, *Bloom v. NLRB*, 153 F.3d 844 (1998) (Pet. App. 1a) ("*Bloom II*").

Relying on *Beck* and *Pattern Makers*, the Eighth Circuit noted that "enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or rejected." (Pet. App. 9a-10a). The court recognized that in spite of this freedom of choice that the law demands, Local 12 had egregiously misused its clause by threatening Bloom's employment if he did not join:

> As Bloom can well attest, when an employee who is approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement in an attempt to pressure him into signing up.

(Pet. App. 12a; *see also* Opp. App. 5a-6a). Given these extreme facts, and the Board's disregard of the court of appeals' instructions in *Bloom I*, the court held that an expunction remedy was necessary to protect Bloom and his fellow employees from any further abuse at the hands of Local 12 and its requirement of "membership in good standing." *Id.*

REASONS FOR DENYING THE WRIT

Local 12 asserts that "the pivotal issue in *Bloom II* ... is 'the facial validity of a union security clause which tracks the language of § 8(a)(3).'" (Pet. 8; *see also* Question Presented, Pet. i). To the contrary, the real issue addressed by the Eighth Circuit and presented here is quite different: whether expunction of the "membership in good standing" clause is an appropriate remedy where it is undisputed that the union actively misused the "membership in good standing" language to coerce employees into joining. (*See* Pet. App. 2a-3a; Opp. App. 5a-6a).

Under the specific and egregious circumstances of this case, the Eighth Circuit felt that expunction was necessary to ensure that all employees' freedom of choice was protected and to ameliorate the effects of the union's misrepresentations. While it is true that the court of appeals did, in the course of its opinion, generally condemn "membership in good st ding" clauses as deceptive and facially invalid, that conde nation was not necessary to the court's underlying remedial decision in this case.[2]

The court of appeals specifically noted in *Bloom I* that "an adequate remedy in this case requires expunction of the offending clause," precisely because the union security clause had been "*unlawfully interpreted and applied.*" (Pet. App. 63a, emphasis

---

[2] The Eighth Circuit stated broadly that it would "no longer uphold or enforce" a union security clause that uses the term "membership" or fails to apprise employees accurately of their rights. (Pet. App. 13a). However, this statement was dicta, because it was not necessary to determine the adequacy of the specific NLRB order under review. The only issue actually before the Eighth Circuit was the type of remedy that is appropriate when a union misapplies its "membership in good standing" clause and coercively misrepresents its meaning to employees. (Pet. App. 63a). For this Court to grant certiorari based on a conflict between decisions, there should "be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." Robert L. Stern et al., *Supreme Court Practice* 167 (7th ed. 1993).

added). In *Bloom II*, the court remanded with specific instructions for expunction of Local 12's illegally applied "union security" clause, because the "settlement agreement approved by the Board on remand seems to have been calculated to evade both the letter and spirit of *Bloom I*." (Pet. App. 12a). Thus, the court of appeals could have rendered the same remedial decision without even commenting on the more general "facial validity" issue.

Stripped to its essence, this case actually concerns the proper remedy for flagrantly illegal enforcement of a "membership in good standing" clause. (Pet. App. 2a-3a; Opp. App. 5a-6a). As such, it presents an issue that the concurring opinion of Justices Kennedy and Thomas in *Marquez v. Screen Actors Guild* recognized was not before the Court in that case, to wit: what remedy is appropriate where "there is evidence that a security clause such as this one was used or intended to deceive or injure employees"? 119 S. Ct. 292, 303 (1998) (Kennedy, J., concurring); *see also id.* at 299 ("we are not deciding whether SAG illegally enforced the union security clause to require petitioner to become a member of the union or to require her to pay dues for non-collective bargaining activities") (opinion of the Court).[3]

---

[3] This case also is distinguishable from *Marquez* in another respect recognized by Justices Kennedy and Thomas. The issue here is whether Local 12's conduct was an unfair labor practice, not a breach of the duty of fair representation. The sole issue in *Marquez* was whether,

> even if [a] union has an exemplary notification procedure and even if the union enforces the union security clause in perfect conformity with federal law, . . . the mere negotiation of a union security clause that tracks the language of the NLRA breaches the duty of fair representation.

119 S. Ct. at 292. As Justices Kennedy and Thomas pointed out, the Court thus did "not have before [it] the question whether use of this language, in some circumstances, might be an unfair labor practice." *Id.* at 304 (Kennedy, J., concurring). Contrary to the NLRB's argument here, this Court's answer to the fair representation question did not necessarily make "clear that a union

(continued...)

The court of appeals' decision ordering expunction as a remedy in this case was eminently fair and proper, and consistent with the Court's subsequent decision in *Marquez*. Because Local 12 has unquestionably violated the law (Pet. App. 2a-3a; Opp. App. 5a-6a), the only issue actually before this Court is the appropriate remedy which will be applied for those violations. While "membership" clauses are facially valid after *Marquez*, the remedy imposed by the Eighth Circuit against Local 12 is certainly within its sound discretion, given the union's egregious misuse of the union security clause. As this Court held in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 n.22 (1986), "the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *See also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697-98 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

Indeed, the court of appeals' expunction remedy is particularly appropriate in this case because the union admitted, in the Joint Stipulation of Facts, that it applied the clause literally and never informed a single soul in this bargaining unit that he or she had the right to opt for nonmembership and pay only reduced financial core fees under *CWA v. Beck*. *See* Joint Stipulation of Facts, ¶ 10; Opp. App. 5a-6a. Given these egregious violations of the law, *Marquez* does not undercut the court of appeals' expunction remedy.[4]

---

[3](...continued)
security clause that tracks the statutory language does not violate the Act." NLRB Brief at 7-8. "As the Court's opinion [in *Marquez*] makes clear, a claim for breach of the duty of fair representation. . . , unlike an unfair-labor-practice claim, must be predicated on more than a simple violation of the [NLRA]." *Marquez*, 119 S. Ct. at 304 (Kennedy, J., concurring); *see id.* at 300, 302-03 (opinion of the Court).

[4] *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *petition for cert. granted and case remanded*, ___ U.S. ___ (1998) is not "on all fours" with the instant case, as Local 12 claims. (Pet. 6). The union in *Buzenius* did not (continued...)

In *Marquez*, this Court took great pains to issue a narrow decision, merely holding that a "membership" clause, standing alone, was facially valid. The Court did not purport to decide the scope of the remedy that would be appropriate for the type of legal violations that the stipulated record presents in this case. *Marquez*, 119 S. Ct. at 299. To the contrary, *Marquez* affirmed that, "[i]f a union negotiates a union security clause, it **must** notify workers that they may satisfy the membership requirement by paying fees to support the union's representational activities, and it **must** enforce the clause in conformity with this notification." *Id.* (emphasis added). The mandatory nature of that holding implies that strong remedies are required when—as here—unions not only fail to provide the necessary notification, but affirmatively mislead or deceive employees. *See* 119 S. Ct. at 303 (Kennedy, J., concurring).

If the Court refuses to allow any expunction order, even under circumstances such as those presented here, strong remedies will never be available to the NLRB and the courts when unions flagrantly mislead and deceive employees about their fundamental right to opt for "voluntary unionism." *Pattern Makers v. NLRB*, 473 U.S. at 104-07. Without the possibility of such strong remedies, unions will have virtual *carte blanche* to misrepresent the truth to employees, since the only penalty a union will suffer when it affirmatively lies — assuming some employee fortuitously learns the truth and has the fortitude to challenge the union in Court or before the NLRB — will be a requirement that the union quietly confess and temporarily post an obscure notice confessing its lie. *See* Pet. App. at 62a-63a. Under those circumstances, the National Labor Relations Act

---

[4](...continued)
use the union security clause to coerce Mr. Buzenius into membership. Indeed, *Buzenius* was even more of a "facial" challenge to the general union security language than *Marquez*. The instant case, in contrast, contains clear evidence that the clause was "used or intended to deceive or injure employees." *Marquez*, 119 S. Ct. at 303 (Kennedy, J., concurring).

will surely become a license for unions to lie to the employees they purport to represent.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Glenn M. Taubman
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel of Record for Respondent
Gary A. Bloom

January 1999

APPENDIX A

Letter from Local 12 to Gary Bloom

October 24, 1991

[*Logo Symbol Omitted in Printing*]

Office & Professional Employees International Union, Local 12

American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress

ANITA L. BILLINGS
Business Manager
Business Representative

JO ANN J. NELSON
Business Representative

JOYCE E. TRACY
Business Representative

970 Raymond Avenue,
Suite 206
St. Paul, MN 55114
Phone: (612) 641-1471

October 24, 1991

Dear Gary:

Our office has been informed that you are now working for Group Health, Inc. We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union. We need these for our records and also to send to our International Office.

If you have any questions please feel free to call us.

Thank you.

Sincerely,

/s/

Bette A. Edmiston
Office Manager

Enc.

#5b:memb
opeiu#12

APPENDIX B

Local 12 Application for Membership

Office and Professional Employees International Union

APPLICATION FOR MEMBERSHIP

Desiring to become a member of a Local Union chartered by the Office and Professional Employees International Union, I hereby make application for admission to membership and authorize such organization to be my exclusive collective bargaining representative.

"Dues or contributions to the OPEIU are not deductible as charitable contributions for federal income tax purposes. Dues paid, however, may qualify as business expense, and may be deductible in limited circumstances subject to various restrictions imposed by the Internal Revenue Code."

Name_____ S.S.#_____
(Print)

Address_____ Telephone_____

City_____ State or Province_____ Zip_____

Occupation_____ Dept._____

Name of company where employed_____

_____ Date_____ 19___
Signature of Applicant

_____
Hiring Date

APPENDIX C

Local 12 Voluntary Check-off Authorization and Assignment

EMPLOYER COPY

VOLUNTARY CHECK-OFF AUTHORIZATION AND ASSIGNMENT

(Name-please print) Position Department

Soc. Sec. No. Badge or Clock No. Bldg. Hiring Date

Home Address_____ Phone No._____

City_____ State____ Zip Code_____

I hereby voluntarily authorize and request

(Employer)_____
to deduct from my wages, on account of membership in the Office and Professional Employees International Union, Local 12, uniform initiation fees and dues as prescribed by the Union. The sum or sums thus to be deducted is assigned by me to the Office and Professional Employees International Union, Local 12 and is to be remitted by the Employer to the Office and Professional Employees Union, Local 12, Minneapolis, Minnesota not later than the 10th of the month of deduction.

I submit this authorization and assignment with the understanding that it will be effective and irrevocable for a period of one year from the signing date, or up to the termination date of the current collective bargaining agreement between the Employer and the Union, whichever first occurs.

This authorization and assignment shall continue in full force and effect for yearly periods beyond the irrevocable period set forth above unless revoked by me by written notice to the Employer and the Union within fifteen (15) days following the expiration of any yearly anniversary date of this assignment.

Union dues are not deductible as charitable contributions for Federal income tax purposes.

Employee's Signature_____ Date_____

APPENDIX D

Letter from Gary A. Bloom to Local 12

October 26, 1991

October 26, 1991

Office and Professional Employees
International Union, Local 12
970 Raymond Avenue, Suite 206
St Paul, MN 55114

Dear Bette:

Thank you for your letter of October 24, I previously did receive the application for membership and the voluntary dues check-off card but had not filled either out. However, I called your office and asked for a breakdown of the union dues because I want to know where my money was going to be used. But no reply was ever sent. Then three weeks ago union dues were deducted from my check. At this time I still desire the breakdown of the union dues and please reimburse me for dues that were collected since I did not authorize these deductions.

Sincerely,

/s/

Gary Bloom
2352 County Road 24
Medina, MN 55356

APPENDIX E

Letter from Local 12 to Gary A. Bloom

October 31, 1991

[*Logo Symbol Omitted in Printing*]

Office & Professional Employees International Union, Local 12

American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress

ANITA L. BILLINGS
Business Manager
Business Representative

JO ANN J. NELSON
Business Representative

JOYCE E. TRACY
Business Representative

970 Raymond Avenue,
Suite 206
St. Paul, MN 55114
Phone (612) 641-1471

October 31, 1991

Mr. Gary A. Bloom
2352 County Road 24
Medina, MN 55356

Dear Mr. Bloom:

Your interest in Local 12 is commendable. I'm sorry I wasn't informed of your request for more information sooner.

The Stewards at the Group Health Building try to give every new Local 12 hire a New Member Packet. Evidently you did not get one as some of your questions would have been answered by reading that material. I am enclosing a packet for you. You might also be interested in the following percentage breakdown of dues:

Per capita taxes (OPEIU International, MN AFL-CIO, Central bodies, etc.)	36%
Staff Costs (wages, benefits, etc.)	42%
Payroll taxes	3%
Office expenses and insurances	5%
Conferences and conventions	3%
Negotiation expenses	10%
Legal and arbitration expenses	2%

I am also enclosing a copy of Local 12's latest Newsletter and am personally inviting you to our next General Membership Meeting on November 20, 1991.

As stated in the New Member Packet, it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty-one days after you are hired. If you choose not to be a member of Local 12, I shall have no alternative but to request GHI that your employment be terminated. It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

Sincerely yours,

/s/

Joyce E. Tracy
Business Representative

JET:LW

cc: Karen Eliseuson, Labor Relations and Employment Manager
Enclosures

(4)

Supreme Court, U.S.
FILED
JAN 22 1999
CLERK

No. 98-909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 12,
Petitioner,

v.

GARY A. BLOOM

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

ROBERT D. METCALF
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1531

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

7pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

ABF Freight System, Inc. v. NLRB, 510 U.S. 317 (1994)	3
Marquez v. Screen Actors Guild, 525 U.S. ——, 67 L.W. 4001 (1998)	1, 4, 5
NLRB v. United Food & Commercial Workers, 484 U.S. 112 (1987)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-909

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 12,
Petitioner,

v.

GARY A. BLOOM

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

ARGUMENT

In tacit recognition that the Eighth Circuit's decision in this case is squarely contrary to this Court's subsequent decision in *Marquez v. Screen Actors Guild*, 525 U.S. ——, 67 L.W. 4001 (1998)—and is hence legally indefensible—the respondent Gary Bloom in his brief in opposition constructs, and then defends, a very different court of appeals decision.

As the brief in opposition recasts the Eighth Circuit's decision, the court of appeals addressed the question of

"whether expunction of [a] 'membership in good standing' clause is an appropriate remedy where it is undisputed that the union actively misused the 'membership in good standing' language to coerce employees into joining [the union]." Br. in Opp. 6. And, in answering this question, says the brief in opposition, the court below merely held that, in the circumstances of this case, such a remedy is "appropriate" as a matter of "sound discretion" in unfair labor practice cases. *Id.* at 8. *See also id.* i ("Where a union wilfully misused its 'membership in good standing' union security clause . . . may the remedy . . . include an order expunging the misused clause from the contract?").

Very simply stated, the decision posited by the brief in opposition does not bear even a passing resemblance to the Eighth Circuit's decision in this case.

1. The Eighth Circuit decision, first of all, was *not* addressed to—indeed could not have been addressed to—"expunction of [a] 'membership in good standing' clause" as an "appropriate remedy." Br. in Opp. 6. As the National Labor Relations Board noted in approving the settlement agreements here—and as the court of appeals did not deny in reversing the Board's decision—"[t]hese revised settlement agreements provided that the above ["members in good standing"] union-security clause would be expunged and a new union-security clause substituted." Pet. App. 20a. Thus, the expunction of the "misused . . . 'membership in good standing' " clause here, Br. in Opp. 6, was an accomplished fact when this matter got to the Eighth Circuit.

Indeed, the revised settlement agreements provide that the new union-security clause would recite the three options available to employees for satisfying the "members of the Union . . . within the requirements of the National Labor Relations Act" provision. Pet. App. 21a. The clause itself goes on to explain that employees may satisfy the requirement to "become members of the Union": i) by becoming a full union member who pays "the Union's initiation fees and periodic dues;" ii) by becom-

ing a "regular service fee payer" who pays "service fees . . . equal to the Union's initiation fees and periodic dues;" or iii) by becoming an "objecting service fee payer" who pays "service fees . . . equal to . . . the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities." *Id.*

Nor is that all. The revised settlement agreements further provide that the Union is to notify the covered employees of the *change* in the collective bargaining agreement's union security clause, that the Union is also to inform the employees of the nonmembers' right to object to paying the non-collective bargaining portion of dues, and that the Union is to honor these objections by reducing the required dues and providing a detailed explanation of the reduction. Pet. App. 52a-53a.

2. The legal context here precludes a court of appeals from substituting its judgment for the NLRB's judgment as to what remedy is "appropriate" as a matter of "sound discretion" in unfair labor practice cases. *Cf.* Br. in Opp. 8. Congress has "delegate[d] to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act." *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 323-324 (1994). Thus, the Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Id.* at 324 n. 10 (quotation marks omitted). That is so whether the Board's remedial determination takes the form of approving a proposed settlement agreement or the form of specifying the proper relief after finding that the unfair labor practices alleged in a complaint were in fact committed. *See NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 128 (1987) ("settlements constitute the 'lifeblood' of the administrative process, especially in labor relations").

Given this context, what the Eighth Circuit did, in fact, was to reverse the NLRB's approval of the revised settlement agreements *solely on a legal ground*—that any reference in a union security clause to the term "member" is so intrinsically "misleading and coercive" that "no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed" by that term. Pet. App. 12a. That ruling, as we demonstrated in our *certiorari* petition (at pp. 8-10) flies in the face of this Court's *Marquez* decision.

3. The brief in opposition's revisionist account of the Eighth Circuit's decision is belied not only by the court of appeals' stated grounds for its decision but by the order entered by the court below. Contrary to the brief in opposition, it is most certainly *not* true that "the court remanded with specific instructions for expunction of Local's 12's illegally applied 'union security' clause." Br. in Opp. 7. The settlement agreement union security clause did not contain the phrase "membership in good standing," and the new clause called for in the settlement had never been "illegally applied."

That being so, the Eighth Circuit's "Instructions and Order" to the NLRB mandated that "[t]he offending union security clause *contained within the third settlement agreement* shall be deleted in its entirety." Pet. App. 13a (emphasis added). What is more, the Eighth Circuit's "Order" directed the inclusion of specific contract language in the parties' collective bargaining agreement in place of the new language the parties had negotiated in their attempt to settle this case. *Id.* 13a & 14a. All of this is of a piece with the Eighth Circuit's erroneous legal ruling, and none of it has anything to do with the brief in opposition's version of the ruling below.

4. In the end, the brief in opposition acknowledges that the Eighth Circuit's opinion "condemn[ed]" all union security clauses using the term "member" as "deceptive

and facially invalid." Br. in Opp. 6. The brief in opposition attempts to take the sting out of this concession by adding that the "condemnation was not necessary to the court's underlying remedial decision in this case." *Id.* And, in the same vein, the brief in opposition asserts that when "[t]he Eighth Circuit stated broadly that it would 'no longer uphold or enforce' a union security clause that uses the term 'membership' . . ., this statement was dicta." *Id.* n. 2.

These palliatives will not do. It is apparent from the face of the Eighth Circuit's opinion that the court of appeals did *not* view its "condemnation" of all union security clauses using the term "member" as being "not necessary to the court's underlying remedial decision." Br. in Opp. 6. Nor did that court view its sweeping statement that "it would 'no longer uphold or enforce' a union security clause that uses the term 'membership,' " as "dicta." *Id.* n. 2.

Given the terms of the revised settlement agreements and the limited role of the courts of appeals in passing on NLRB settlement agreements, it is impossible to discern any ground for the court of appeals' reversal of the NLRB's decision other than the erroneous ground so boldly stated in the Eighth Circuit's opinion—that " 'member' is not a term of 'art,' . . . but one of deception." Pet. App. 12a. That statement of the law, of course, inverts the *Marquez* Court's authoritative statement of the law—"the relevant provisions of § 8(a)(3)[, in particular, the term 'membership,'] have become terms of art." *Marquez*, 67 L.W. at 4005.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the Eighth Circuit and remand this case for further consideration in light of *Marquez v. Screen Actors Guild, supra.*

Respectfully submitted,

ROBERT D. METCALF
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1531

JAMES B. COPPESS
815 16th Street, N.W.
Washington, D.C. 20006

LAURENCE GOLD *
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record